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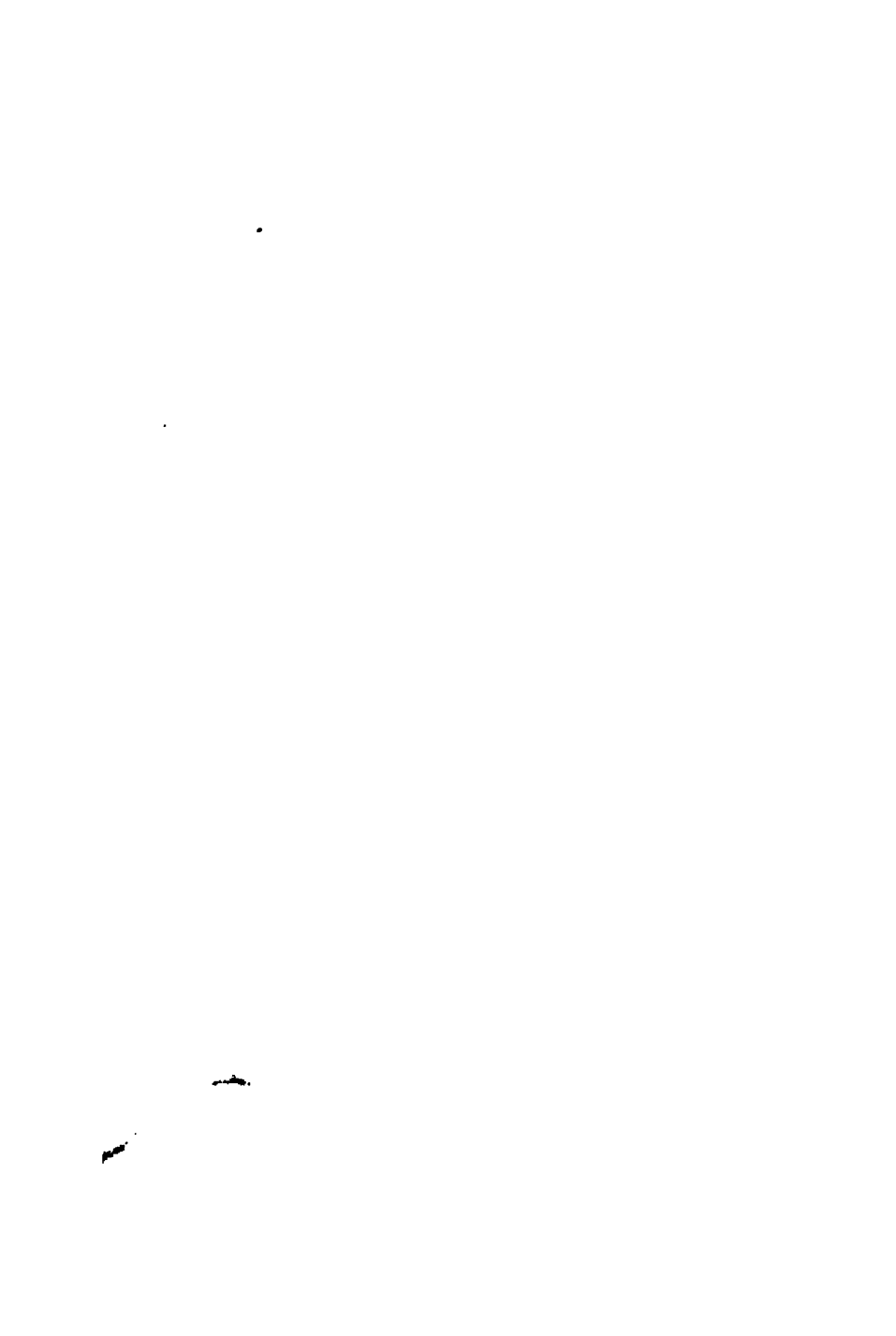
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BARRISTER-AT-LAW; LATE FELLOW OF KING'S COLLEGE,
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HISTORICAL HANDBOOKS

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vening century is in danger of dropping out of sight, not only in regard to these particular students, but in the general education of the country. Yet few, if any, of the changes recorded in English history have been more momentous than that transformation of our legal system which, begun within the memory of persons scarcely to be called old, is still in progress, surely if somewhat slowly in this country, more boldly and rapidly in the newer fields of India and America.

It has occurred to the present writer that this is largely due to the want of a convenient text-book on the subject. The account of each particular reform may perhaps be found incidentally noticed in manuals professing to deal with the present state of that branch of the law, in the biographies of the individuals who took the lead in carrying it out, or in general histories. But a combined view of the whole seems to be still a desideratum. This want it is here attempted to supply, by giving, as compendiously as is consistent with clearness, a history of the laws of England from the year 1765, when the first attempt to describe them as a whole in a popular form was made by Sir W. Blackstone, down to the present time. In such a history it will be convenient to confine our attention as much as possible to the laws for the determination of disputes between individuals and the punishment of wrongdoers, excluding, on the

one hand, laws purely economical, which determine the contributions and services to be required from members of the community for common purposes, and, on the other hand, laws properly constitutional, *i.e.*, those which determine rather who is to command than what is to be commanded. In watching what laws were made during each period, curiosity cannot fail to be excited as to the power which made them; but such curiosity must in general be gratified elsewhere.

Our first task, then, is to examine the laws of England as depicted by Blackstone under three main heads :—

I. The form in which they were enunciated.

II. Their substance.

III. Their administration : involving an account of the different courts of judicature, the rules of procedure in each, and the practical working of the system.

ERRATUM.

Page 30, line 4, for "Elizabeth" read "Henry VIII."

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PART I.

The English Law in the time of Blackstone.

CHAPTER I.

THE FORM IN WHICH IT WAS ENUNCIATED.

Law-Making in General.—The popular conception of legislation is the true conception of the most perfect kind of legislation: a lawgiver, or body of lawgivers, laying down general rules in set terms, and publishing them to all the people who are expected to obey them—like Moses coming down with the tables of stone in his hand. Unfortunately, this picture is only occasionally and partially realised in practice. Law does not, in ordinary history, spring full-grown from the head of the lawgiver. The usual course of things is something of this kind. First, isolated commands are given by those who have the power to enforce them, and isolated disputes settled each on its own merits. Then, from a general similarity between the points which have to be decided, and the motives which operate to produce the decision, rulers and subjects get a notion of an unwritten standard, which ought in general to be conformed to. It may be that these rules are subsequently written down and promulgated by authority in a more or less systematic

form; if they are, it is almost certain to be the case that only the rules upon points which have occasioned difficulty and discussion are set down, while the ordinary course of procedure, which seems to those living under it like a law of nature, is taken for granted. In other instances no code at all is promulgated, but particular innovations, rendered necessary by the progress of society, and sanctioned by the deliberate choice of the people or their rulers, are enacted in the form of statutes, which assume acquaintance with a body of customary, unwritten law, as already existing, and continuing to exist, so far as unrepealed. In either case new questions crop up after the promulgation of the code or statutes, and have to be settled in some way or other, so that a great part of the law as actually administered will always be what is called judiciary as opposed to statute law, *i.e.*, it will depend for its binding force on the fact that it has been declared by a judge *a propos* of some particular case, and that other judges consider themselves bound to follow the decisions of their predecessors in like case.

English Law-Making.—The history of English Law is no exception to the general rule. At the time at which the present sketch is supposed to commence, *viz.*, the middle of the last century, English Law consisted, as it still consists, of the following elements:—

1. **The Common Law** in the narrower sense of the word: rules known or assumed to have been already in existence before the earliest statutes now in force,—at all events, not owing their existence to any known statute. In reality some of the rules are quite recent, having been framed by modern judges to meet new cases as they arose; but the theory has always been, that the rule existed somewhere, in the air or in the breast of the *sovereign*, who, as we are told, “never dies,” or of his

judges, from time immemorial. Other rules are really so ancient that we cannot trace them to any authoritative source, but we accept the evidence of ancient text-books as showing what was believed to be law when those books were written. How this more ancient part originated is a complicated question which we are not now called upon to solve; customs of the Romanised Britons, or of the untamed Germans in their native land, laws of the Anglo-Saxon kings whose date and authorship have long been forgotten, feudal rules introduced by Norman lawyers, Roman civil and canon law introduced in many successive layers, sometimes openly, sometimes borrowed without acknowledgment, may each be known or suspected to have contributed something, but how much, must be to a great extent matter of conjecture. Whatever its origin, the only authorised form in which the Common Law existed was that of a few old treatises, the most important being two by Lord Coke, written early in the seventeenth century, and several hundred volumes of reported cases, in each of which some infinitesimal part of a general rule was to be found embedded among the particulars of a more or less prolix narrative.

2. Equity may be defined as a distinct set of rules, administered by a different set of courts, the chief one being the Court of Chancery, partly dealing with subjects as to which the Common Law had nothing to say, partly overriding the Common Law in its own department; so that a man might be sure of succeeding, nay, might actually have succeeded, in a Court of Common Law, but might be forbidden by the Court of Chancery, on pain of imprisonment, to go on with his action or to reap the fruits of it. The history of this anomalous state of things is very curious, but does not concern us at present. It is enough to say that the Court of Chancery, as representing the pre-

sumably more enlightened impulses of the king's conscience, claimed, by virtue of that superior enlightenment, to remedy whatever might seem unjust or defective in the decisions of the Common Law Courts, which only professed to declare what had been law from time immemorial. This was virtually to assume a royal prerogative of legislating without the co-operation of the two Houses of Parliament,—an assumption which in its direct form had always been sternly denied,—and was long an occasion of discontent; but as Parliament was not prepared to do the work itself, and could not deny the necessity for it, it did no more than grumble, and at last gave up even that. Ultimately, when direct legislation became easier and more effective, chancellors ceased to innovate, and confined themselves to cultivating the field which had been won by their predecessors.

For "Equity," also, the only authoritative source of information was a series of reported cases, even more voluminous than the former in proportion to the number and importance of the subjects treated of. It should be added that, with regard both to equity and to Common Law, there was no definite test to distinguish what was law from what was not. Since, with such a voluminous mass of reports, it was not likely that the attention of the judge would always be called to every precedent in point, and since even if it was, he might easily fancy that he saw a distinction between two cases which his successors might fail to perceive, it was naturally not of infrequent occurrence that there should be apparently opposite precedents capable of being cited on either side; and in that event, neither the number of the decisions, nor their earlier or later date, nor the reputation of the judge, nor the dignity of the court from whence they proceeded, was recognised as an undeniable mark of authority, but some

combination of all these ingredients, estimated very much according to the fancy of the judge.

3. **The Statute Law.**—In the Middle Ages the direct law-making power of Parliament was, as we should consider, very sparingly used. The Commons “felt themselves better qualified to state a grievance than to propose a remedy;” they sat only for a short time, had not much literary skill among them, and had not, what is now the chief motive power in legislation, a ministry united in policy, resting on the support of a parliamentary majority, and placed in office on the express understanding that particular measures are to be pushed through. Moreover, there was a disposition to look upon the common law as something self-existent and quasi-sacred. It was considered an almost fatal objection to any proposed reform to say, “This cannot be done without making a new law.” Still, even in the reigns of the Plantagenet and Lancastrian kings, the statute-rolls were not altogether a trifle. In the Tudor and Stuart periods the pace was considerably accelerated, and still more after the Revolution; the bulk of a year’s legislation of George II. or George III. is nearly as great as that of an average year of Victoria, though the substantial alterations effected are usually far greater in the latter. At this time the legislation of a whole year was considered as a single statute, and written on a single roll of parchment, each chapter, or as we should say each statute, being written, as many legal documents still are, as one sentence without a single stop from beginning to end. This particular defect was remedied by the printers in the published edition; but the printers could not cure the involved constructions resulting from the perverse theory, much less the long-winded titles, useless preambles, variations in the meaning of words, and general obscurity of the whole pro-

duction, which resulted from no theory at all, but from mere indolence and love of routine. There was some reason for preferring even case law, with its hundred volumes of reports, to statute law of this type; for in the former, the rule to be followed, supposing it could be extracted at all, was a principle which had actually operated on the mind of some preceding judge, when brought face to face with real facts; in the latter the problem was to put a meaning on a string of words which very possibly never had a distinct meaning in the mind of any human being whatever, but were the almost accidental result of a confused scramble in a Parliamentary Committee.

It should be added that an entirely different system of law, based mainly on the Roman civil law, partly on the canon law, was in force in the ecclesiastical courts, which dealt not merely with causes of a purely ecclesiastical character, but also with questions between husband and wife, cases relating to wills and the distribution of the personal effects of intestates and some other matters; and that the Roman civil law was also administered in the Admiralty Courts.

The mess was somewhat further thickened by the fact that local and sectional customs, provided they fulfilled certain conditions, were always admitted to supplement, and sometimes to override, the general law of the land.

If the arrangement, or absence of arrangement, of the contents of English law was remarkable, its technical phraseology was no less so. It would be a great mistake to deery technical legal language as such: in law, as in any other business where brevity and precision is required, the language of ordinary life will not answer the purpose without a great deal of trimming and defining; and though simplicity is a great advantage in those parts which

are addressed to the people at large, there are other parts, such as the rules of procedure, which are more especially addressed to those who have to administer the law, and in which, therefore, the creation of new terms may be a great saving of time and assistance to the memory. But the English law-jargon had the faults without the merits of technicality. It was a few years before the time of Blackstone, that the "pleadings" had begun to be recorded in English instead of the mediæval law Latin—a change of which Blackstone himself by no means approves; and this Latin had itself been substituted, some four centuries earlier, for the still more barbarous Norman-French. Each of these languages had left, on retiring from the field, a residuum in the shape of words which it was felt to be impossible or ridiculous to translate literally into English, and for which no one had any satisfactory substitute to propose. These had not the advantages of a scientific terminology, inasmuch as they were formed on no fruitful principle; you could not develop verbs and adjectives corresponding to *habeas corpus*, *nisi prius*, or *cestui que trust*, much less make them branch out into such multitudinous but orderly compounds as those by which the botanist or the chemist marks the mutual relationships of the subject-matters with which he has to deal. On the other hand, they had the full disadvantage of technicality, namely, that of conveying no meaning at all to the uninitiated,—in most cases not even to those familiar with the language from which they were derived. The profoundest Latin scholar would have been unable to divine that *præmunire* meant the offence of, or the punishment for, abetting Papal usurpations, and a number of other acts bearing a real or imaginary resemblance thereto; that *quo warranto* meant a proceeding to determine the right of a person to exercise

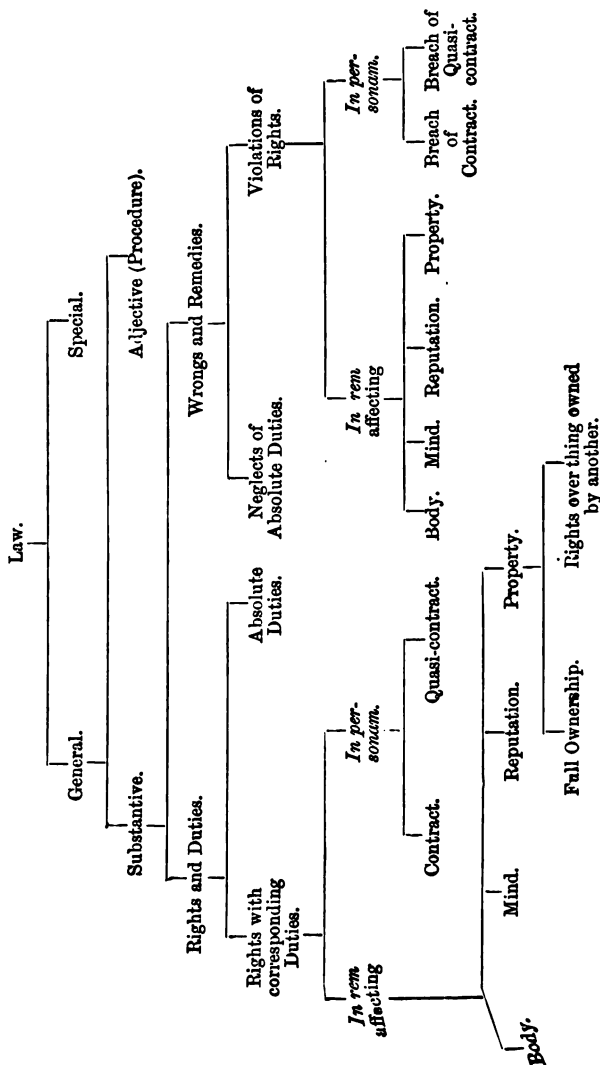
an office, especially in a corporate body; or that a writ of *elegit* was a proceeding whereby a creditor could take temporary possession of one-half the lands of his debtor.

But still more serious defects than the uncouthness and inaptness of the technical terms used, were the indefiniteness and the alternate meagreness and superfluity of the ideas expressed by them. Thus the main division of offences was a three-fold one—into treasons, felonies, and misdemeanors. The difference between treason and felony consisted partly in a difference as to the nature of the act,—treasons being offences which were supposed to have a more direct relation to the person or the dignity of the king; partly in a difference as to the punishment, the traitor being liable to barbarous mutilation in addition to hanging, and forfeiting both lands and goods; while the felon was, with some and ultimately a good many exceptions, liable to be hung without mutilation, and to forfeiture of goods, but not necessarily of lands. The difference between felony and misdemeanor consisted mainly in the form of procedure, the latter being in point of form half-way between a civil and criminal trial; partly also in the punishment, no misdemeanor being capital, though it was not at all uncommon to find some misdemeanors more heavily punished than some felonies. Moreover, there were some offences, as heresy for example, which were neither treasons, nor felonies, nor misdemeanors, so that the classification, besides being useless and superfluous, was not even formally complete.

On the other hand, there are many distinctions of the utmost importance with a view to the just appointment of rights, duties, and punishments, for which not even a name had been found in our legal system. This will abundantly appear further on, when we come to measure it by the standard of a complete code.

All things considered, we shall, perhaps, not be surprised to find some readers of Blackstone, while admitting the general necessity of the rule that "ignorance of the law does not excuse," yet taking exception to the ground on which he justifies it, viz., "that every man *may* know the law," the notorious fact being, that very few, even among lawyers, know more than a very small part of it.

Such was the state of the English law with regard to its *form*. Any one, therefore, who wishes to obtain or impart even a general idea of its *substance*, must begin by making a form for himself. It will be better, for the present, to discard even the terminology of English law, and approaching it as it were from the outside, to fancy ourselves describing it to some foreign jurist, as a naturalist would describe a new plant to his fellow-naturalist, using the terms and the classifications of abstract science. Having in our minds the framework of a model code of laws, we shall be better able to note the deficiencies of our particular system, and to compare it with other systems. Such a framework will be in some degree supplied by the following table, put together in a somewhat eclectic fashion from the diverse systems of Bentham, Austin, and J. S. Mill



The terms used in this table may require explanation.

Substantive Law : the commands and prohibitions bearing directly on the ends which the legislator desires to attain. *Adjective Law* : directions for the guidance of those employed in giving practical effect to the substantive law, commonly termed the "Law of Procedure." *Special Law*, or, to use the term borrowed by most jurists from the Roman law, *the Law of persons*; or, more appropriately, *the Law of unequal rights*. In every community there are some classes of persons who are either more or less controlled, or more or less protected by the law than the general mass of the citizens. Among these we may or may not find such specially privileged classes as—

Kings;

Nobles;

Members of a conquering race, or sacred caste;

Priests;

Soldiers;

Old men, as such, or fathers and grandfathers in relation to adult descendants.

And such specially disabled classes as—

Members of a subject race, or of a defeated political faction;

Dissenters from the established religion;

Foreigners resident in the country;

Religious devotees, who profess to have abandoned the cares and interests of the world, and are taken at their word;

Serfs or slaves;

Paupers.

There have hitherto, as a matter of fact, always been included,

As invested with special powers and duties—

Husbands in relation to their wives;

As subject to special control, and in relation to the rest of the world as under certain special disabilities—

Wives in relation to their husbands.

Sometimes, and in some respects as specially privileged, more often, and in more respects as specially disabled—

Women as such.

There must necessarily, so far as we can see, always be included, as specially protected and specially disabled—

Young children of both sexes, and

Lunatics,

With corresponding powers in each case vested in their parents or other legal guardians.

There is an obvious convenience in separating the exceptional laws affecting such classes, whatever they may be, from the general body of the laws which affect citizens simply as such.

Rights, Wrongs, and Remedies.—There is much to be said for and against this distribution of the subject, but such a discussion would be out of place in an elementary treatise.

Rights against the World at large.—"Rights *in rem*" is the concise, but not very expressive phrase by which we distinguish, in the technical language of jurisprudence, such rights as that of a man to the free use of his limbs or of his property, called rights "*in personam*," from such rights as that of a creditor against his debtor, for payment of his debt, or of a person who has suffered an injury against the person who has caused it, for compensation and satisfaction. A moment's consideration will show that the right of property is the only one about which there is much to be said, apart from the question of its violation. We require a law to define who is the owner of—*i.e.*, who has the exclusive right to the enjoyment of—a given piece of land, a particular coin, or a particular

horse. We require no law to define who is the owner of a given body, mind, or reputation.

Absolute Duties are those which have no individual rights corresponding to them. This will be made clear when we come to describe them.

Rights arising from Contract and Quasi-Contract.—The rights which avail not against the world at large, but only against some particular individual, may, as we have seen, arise from the voluntary agreement, or contract, by which that individual has burdened himself with the correlative obligation, or may arise from some wrong which he has committed, and which he is under an obligation to redress. But they may also arise in a variety of other ways, involving neither contract nor injury, as by the obligation to requite a service rendered, to return money paid under a mistake, to compensate for harm innocently caused. The ingenuity of jurists having failed to invent a neutral name for this neutral class, the two names, equally appropriate, or equally inappropriate, of quasi-contract and quasi-delict were suggested; but it is now generally considered that to split the class into two would be a needless complication, and therefore the one term "Quasi-Contract" is used to cover the whole.

Wrongs and Remedies—The remedy may be either civil or criminal. A civil remedy is one which consists in affording compensation to the sufferer, if he chooses to demand it, at the expense of the offender; the criminal remedy consists in punishment indicted on the offender for the protection of society at large, without any reference to the wishes or interests of the individual sufferer. Strictly speaking, it is only the former which is a remedy, at least a complete one; the punishment is at most only a remedy for what Bentham calls the "evil of the second order," *i.e.*, the alarm occasioned to those who see or hear

of the crime and have reason to fear its repetition ; it is not expected, as punishment, to have any effect in undoing the immediate mischief. The distinction between "civil" and "criminal" is thus of considerable importance in substantive law, but it plays a still more important part in the adjective law, or procedure.

Our next task will be, to take all those topics in order, and endeavour to represent, under each head, the condition of English law in the eighteenth century, such as it would have been had it assumed the complete form of a code.

CHAPTER II.

PROPERTY, CONTRACT, AND ABSOLUTE DUTIES.

I. PROPERTY.

Meaning of the term "Property," &c.—As before stated, there is little or nothing to be said under the head of *Rights in rem, with corresponding Duties*, except concerning the right of property or ownership; since the *title* to a given body, mind, reputation, or condition, can hardly give rise to much litigation, while the right of each person to the *use* of his own body, mind, &c., is in all systems understood to be qualified only (1) by the general obligation not to use them to the injury of other persons, or of the state,—though the question, what constitutes an injury, is of course answered differently in different systems;—and (2) by certain positive obligations which will find their proper place under the head of "Absolute Duties."

The words *property* and *ownership*, the former more especially, are wont to be used in a great variety of senses. In this work *property* will be used simply as a general term for material things considered as the objects of rights *in rem*; *ownership* will stand for that most perfect type of a right *in rem*, which we may define as a right to use a given thing in a manner which, though not necessarily unlimited, is indefinite." The other rights *in rem* over material things, the rights, namely, of using, in certain definite ways,

things owned by others, are distinguished, by a term borrowed from the Roman law, as "servitudes." What we want to know about ownership is, (1) what things are the subjects of it ; (2) the limitations to the power of the owner over the thing owned ; (3) how it is determined who is the owner of a given thing ; in other words, how *titles* are created, transferred, modified, and extinguished.

Subjects of Ownership.—(1.) The question, what things are the subjects of ownership, is most easily answered by saying, what are not. In some systems of law we find mention of things which are not the subjects of ownership, simply because nothing has been done to make them so,—*res nullius*, as the Romans call them. Blackstone's view of the law of England in his time was, that it recognised no such class of things liable to be appropriated by the first occupant. It stands to reason that there can be no ownership of things which have no value ; *i.e.*, which either (1) afford no enjoyment to anybody (if that can be truly said of anything in nature) ; or are inaccessible, as the sun and moon, or the centre of the earth ; or (2) as being indestructible, or unlimited in amount, can be enjoyed by any one *ad libitum*, without interfering with the equal enjoyment of every one else. Such is, under ordinary circumstances, the case with air and light and the water of the sea or of great rivers.

Human Beings.—Again, in most countries in other ages, and in many down to this day, human beings have been reckoned among possible subjects of ownership. In England, a modified form of slavery, known as villenage, subsisted for many centuries, but had been gradually more and more mitigated, and at last totally extinguished, nearly two centuries before the time of Blackstone. In his day, however, negro slavery was fully recognised in our American colonies, and even specially encouraged by

the British Government, though an attempt made in 1771 to introduce it into England itself was promptly and decisively defeated in *Sommersett's case*.

Wild Animals.—These, according to the original principle of English law, derived perhaps from the Romans, were not considered as subjects of ownership so long as they remained alive and wild; but most extensive inroads had been made into this principle by the group of statutes known as the game laws, to be noticed hereafter.

Ownership of Land.—It has long been a favourite question among speculative politicians how far land, a thing not produced by any human exertions, and the use of which is absolutely indispensable to the existence of mankind, can properly be the subject of individual and exclusive ownership. It is needless to say that the English common law owed its development to causes very different from the speculations of philosophers; but, as a matter of fact, its ancient doctrine so far corresponded with the view advocated by some of the best thinkers of the present day, that it refused to recognise any private rights over land except rights of occupation, more or less permanent, conditional on the rendering of certain services to the sovereign. From this theory, traceable partly to feudalism, partly to the primitive tribal institutions of the Teutonic race, arose that remarkable distinction of the English law between *real* and *personal* property. In all systems we should expect to find some legal distinction between immovable and movable things; but the English division means much more than that. *Real property* is, in its origin, not a species of private ownership, but a quasi-political status, the rights conferred and the duties imposed both having relation primarily to the benefit, according to the older Saxon theory,

of the tribe or nation; according to the later mediæval theory, of the feudal lord, or of the king as lord paramount. Hence, although, in the course of time, by shaking off the burdens while retaining the advantages of his position, the *tenant* had placed himself very nearly on a level with an owner of personal property, we have no reason to be surprised that the rules affecting the former differed in many important respects from those affecting the latter, nor that the line drawn between them by no means exactly corresponded with that drawn in other systems between movables and immovables. It may be said generally, that those interests in land which were never recognised in the feudal system, were, however large and important, considered as personal property; while, on the other hand, many interests ranked as real property which were only remotely connected with land, such as a clergyman's tithes, the right of presentation to a benefice, the title deeds of a landed estate, a peerage or other title of honour originally connected with a particular locality.

The rights just mentioned, with others which it would take too long to specify, have all of them really, though some of them rather remotely, material things for their subjects, and are therefore, according to our definition, rights of property. But there are some rights *in rem* which have no definite subject, either near or remote, but which nevertheless may be capable of being transferred from one person to another, and have a definite exchangeable value, and therefore may most conveniently be treated of in connection with, though not as actually being, subjects of ownership. The essence of a right of this kind is, that while the person invested with it is allowed to do certain acts and protected in doing them, all other persons are forbidden to compete with him, in

order that he may reap an exclusive profit. These rights usually take the form either of a *franchise*, such as exclusive rights of sporting, or such as the exclusive right to keep a market or a ferry, and to take toll from those who resort to it; or else of a *monopoly*, i.e., an exclusive right to make or sell commodities of a particular kind. These monopolies were exceedingly common in the reigns of Elizabeth and James I., being created at discretion by royal letters patent, under what was assumed to be a prerogative of the Crown, to the great profit of the court and its favourites, and to the great annoyance of the subjects generally. But towards the end of the reign of James I. the growing power of the House of Commons extorted the assent of that monarch to a statute whereby all such monopolies were, with very few exceptions, declared void. One of these exceptions was in favour of *patents*, as they are now called, giving for a term not exceeding fourteen years the sole right of working or making any manner of new manufacture to the true and first inventor thereof, it being thought that the inconvenience of this restriction would be more than counterbalanced by the advantage of inducing inventors to perfect their inventions and make them known to the world. This was the only one of the exceptions mentioned in the Statute of Monopolies, which was still unrepealed in the time of Blackstone; but there was another, which, abandoned half a century after that statute as an engine of political repression, may be said to have been revived in another form as a private proprietary right. The statute of James I. reserved to the Crown the right of determining who should be allowed to print books, and prohibiting all other persons. This provision was repealed in 1640, and the last act of the kind expired in 1698. It was soon discovered that the laws

which had been so oppressive to authors in one way had protected them in another, and that they were now for the first time exposed, without any defence, to the competition of any one who might think proper to sell a cheaper edition of their published works. This injustice was to some extent remedied in the reign of Anne, by an Act which gave an exclusive right of multiplying copies for fourteen years, either to the author himself or to the publisher to whom he might have sold his work, and for a further term of fourteen years to the author himself, if living; at which point we may leave the law for the present.

Before dismissing *subjects of ownership* it may be worth while to remark that every right *in personam* may at the same time be the subject of a right *in rem*,—property in short. Thus the right of a creditor to have his debt paid is in one sense only enforceable against the debtor; but the world at large is under an obligation to abstain from obstructing the proceedings taken by him to enforce payment, and any breach by a stranger of this negative duty must be considered as a violation of a right *in rem* residing in the creditor. So also, if the law of any country empowers a creditor to sell or give his claim to a stranger without the consent of the debtor, or enables the creditor's creditors to enforce payment of it to themselves, it clearly becomes *pro tanto* a piece of property. The English law on this point was then, as it is now, in so anomalous a condition, that a right of this sort, called a *chose in action*, was not transferable according to the common law, but was transferable according to the rules of equity, so that the purchaser of it could only sue in the Courts at Westminster, or at the Assizes, as the agent of the original creditor, but could appear in his own person in any proceedings coming within the jurisdiction of *the Court of Chancery*.

Limitations to Power of Use and Disposition.

—Full ownership of personal property was subject to no limitations at all, except, as above remarked, the general obligation to abstain from wrong. In the language of the Roman lawyers, he had the *jus disponendi, utendi, fruendi, et abutendi*. This last right applied in full force even to sentient beings other than human, there being no law to prevent any degree of cruelty towards even the noblest of the brute creation. With respect to real property also, in the form in which it comes nearest to full ownership, the estate in fee simple, there were no recognised limits to the owner's power of use and abuse during his lifetime. The interest of the nation at large in the land, though admitted to some extent, as we have seen, in theory, could not practically be appealed to even to prevent the turning of a garden into a desert, or the exhaustion of mineral treasures which could never be replaced. The *jus disponendi* was limited by a variety of statutes controlling trades supposed to be dangerous either to the bodies or to the minds of the people, the method of control being generally to forbid any person to sell the suspicious commodity without a licence, such licence being of course granted on certain conditions, and withdrawn if those conditions were not fulfilled.* It was also limited by the revenue laws, and the laws established for the protection of domestic manufactures. Lastly, there was one prohibition which cannot be brought under any of the above heads, namely, that against the sale of *game* by any person whatever, even those duly qualified to kill it; the intention being apparently by all means to keep

* Note that these licenses differ from the monopolies before spoken of, in that the general prohibition is not imposed for the benefit of the licensee, but for the protection of the public, and the licence is, or is supposed to be, given to all who undertake to fulfil the necessary conditions.

up the amusement of sporting as an aristocratic privilege, and, by preventing it from being profitable, to remove temptation from the unprivileged classes.

Power of Disposition after Death.—It would perhaps be impossible, among modern nations at all events, to find a system in which an owner's power of disposition has been altogether limited to his own lifetime. In England, not only did a posthumous power exist over both real and personal property, but it was so extensive as to be almost suicidal, going far to enable the first owner to prevent any similar exercise of it on the part of his successors. It was only after a long and doubtful struggle that the unlimited control once claimed for the dead over the living had been restrained within anything like moderate limits. To the various shifts and countershifts resorted to by the contending parties in this struggle is due so considerable a part of the anomalies which have tried, and are still trying, the energy and skill of law-reformers, that a brief account of it seems almost indispensable as an introduction to our proper subject. From the nature of the case the history relates almost entirely to real property, since that alone, before the growth of the modern facilities for investments, had the requisite character of permanence. Landowners have generally sought to exercise this posthumous power in one of two ways; either by prescribing an order of devolution *ad infinitum* among their own descendants, or by devoting the land to the perpetual support of some institution which they conceived to be beneficial to the public, or conducive to their own honour and glory, or, according to their religious belief, to the glory of God, or their own welfare in a future world. Consequently our history will have to follow two distinct lines: the law of *entail*, and the law of *endowments*, commonly called the law of *mortmain*.

The Law of Entail.—In the primitive form of what is known in history as the feudal system, the only person who could properly be called an owner of land was the king or chief who had won it by the valour or good fortune of himself or his followers. He allowed these followers to occupy portions of it on condition either of rent in kind, or of gifts on special occasions, or simply on condition of military service when required. It was a purely personal arrangement with the tenant, at whose death the land would naturally revert to the grantor, or lord, to be granted out again at his discretion. But, probably from the very first, there was usually some sort of expectation on both sides that, if the tenant should leave a son fit to fill his father's place, that son would have it in preference to any one else; and it soon became common for that expectation to be expressly embodied in the terms of the grant, to "A and his heirs." This, however, was not understood to give the heirs any claim independently of A's wishes; it was only as a favour to him, and to gratify his feeling of parental affection, that the lord promised to accept his son as a vassal. If he were on bad terms with his heir, and did not wish him to succeed, the land would in strictness have reverted to the lord. But the tenants seem to have come to think that the mere fact of the existence of an heir put the reversion to the lord out of the question, and enabled them to dispose of the inheritance as they pleased, for money or favours; a notion which was at first acquiesced in, but ultimately alarmed not only the lords, who feared to lose their chance of reversion and their veto on the admission of unacceptable strangers, but even the tenants, who, not wishing to alienate their lands themselves, were anxious to prevent any unthrifty descendant from doing so. For these reasons an Act was passed in the reign of

Edward I., generally known as the Statute de Donis, enacting that where the grant was expressed to be to "A and the heirs *of his body*"—for a grant to "A and his heirs" simply was understood to imply an intention that A should have full power of disposition—the terms of it should be strictly observed, *i.e.*, that it should descend regularly from father to son, without either lord or tenant having any power to alter the succession, and that in default of direct descendants it should revert to the lord. The principle of perpetual succession as between private individuals, depending on the fiat of some remote ancestor, being thus for the first time formally recognised by the Legislature, remained without being directly assailed for about 200 years; though it is probable that it was to some extent evaded by means of what were called *uses*, as to which we shall have more to say presently. But in the reign of Edward IV., the king and the public at large being desirous of abolishing it, while the Legislature, at least the House of Lords, was determined on its retention, the difficulty was got over by the judges, who invented, or lent their countenance to a fiction at once barefaced and cumbrous, by which the tenant in tail was enabled to put a purchaser in possession of the fee-simple, and defeat the expectation of the legal heirs. Early in the Tudor period, after that the power of the great nobles had been broken, the formal sanction of the Legislature was given to another legal fiction, by which some, though not all, of the same purposes were attained; and these two proceedings, the former under the name of a *common recovery*, the latter under that of a *fine*, were still in ordinary use in the time of Blackstone, and for some time after, to the great profit of lawyers and to the bewilderment of the laity. These, however, could *only* be put in force by a tenant in tail entitled to the

actual possession, and of full age; hence, in families which attached great importance to preventing alienation, the plan was adopted of inducing each eldest son as he came of age to execute a deed by which his estate-tail was converted into an estate for life, followed by an estate-tail to his first and other sons in succession. Land-owners, however, were not satisfied with simply securing in this way that the two next successions should follow the order of primogeniture; they wanted to effect all manner of purposes, for which the common law afforded no machinery, such, for instance, as to provide for charging the land with portions for younger children, should there be any, or for giving some person a discretionary power to change the devolution or distribution of the estate. These purposes were chiefly carried out through what were known as *uses* and *trusts*, words of which the meaning originally was the same, but afterwards came to be very different. First, when it was desired to carry out some arrangement which the courts of law would refuse to enforce, either as being too complicated or as conflicting with some maxim of law or public policy, the practice was to give the legal ownership to one person, expressing that he held it *to the use* of the person intended to be benefited, or perhaps *to the use* that certain things should be done with it. These uses or trusts were of course not binding at law; but they were no doubt binding on the conscience of the person who had received the estate on that understanding, and the clerical chancellors of Plantagenet and early Tudor times considered themselves bound and entitled to quicken the consciences of the king's subjects in such cases by compulsory measures; none the less, perhaps, because these *uses* were largely employed for the advancement of clerical objects. *This habit of separating the legal from the*

beneficial ownership produced probably some advantages, but also a great deal of confusion and uncertainty; and it was in the hope, apparently, of somehow securing the former without the latter, that the famous Statute of Uses, 27 Hen. VIII. c. 10, declared that the *use* should always carry with it the legal ownership. The actual result was very different, owing to the strange conduct of the Courts of Common Law, which held that the statutory spell was exhausted by a single exercise, so that, if a grant were made by A to the use of B to the use of C, A would be a mere conduit pipe, B would be the legal owner, and C, so far as they were concerned, would be left altogether out in the cold. This of course was "against conscience," as the chancellors were not slow to see; and C was recognised in their courts as having the same sort of *equitable* claim on B that B would have had on A before the statute, only that it was called a *trust* instead of a *use*. Not that the statute was altogether nugatory; though it had not put an end to double ownership, it had rendered the legal ownership itself capable of being subjected to a much greater variety of modifications and conditions. Thus, though the law would not allow a landowner to say directly, "I give my land to A unless and until a certain event happens, but if ever that event happens it is to pass to B;" still less to say, "I give my land now to A to hold from the beginning of next year, retaining it myself in the meantime;" yet, by virtue of the statute, it allowed him to say, "I give my land to Z to the use of A till the event happens, then to the use of B," or "to the use of myself till next year, then to the use of A,"—whereby exactly the same objects were attained. Z, who before the statute would have been the legal owner, is a mere name; A and B, nominally only persons with a certain claim on Z's conscience, take suc-

cessive legal ownership in a way which otherwise they could not legally have taken. So, again, the law would not enforce a deed or will professing in so many words to give my land, now or at some future time, to be distributed among my children or others at the discretion of A; but it would give effect to a conveyance to A to the use of the persons named, or such of them as A, or some other person, should appoint. The power of cutting and carving the estate by means of *trusts* was naturally still wider, extending even so far as to change real into personal property, and *vice versa*, by means of a trust to sell the former, or to invest the latter in the purchase of land; since "equity looks upon that as done which ought to be done," though it might in fact never be done, or even be intended by anybody to be done. It would sound too outrageously paradoxical to say that in all these ways the liberty of alienation was diminished by being increased: the real increase being in the liberty of the original owner to restrain the liberty of the subsequent owner. To this there could be no objection,—unless on the ground that there must be a limit somewhere to the amount of complication which judges can fairly be required to unravel,—so long as the original owner only cut and carved what was rightfully his; but great watchfulness was necessary to prevent him from eluding, among the windings of this labyrinth, the just and salutary limits which had been set to his posthumous power by the entail-barring fictions above described. Many were the devices employed for this object, some successful, some unsuccessful. In the time of Blackstone some points were still unsettled, but the line was beginning to be fixed nearly where it has stood ever since; namely, that by no method whatsoever, neither by direct entail, nor by *shifting use*, nor by *power of appointment*, nor by *trust*, can an estate be tied up

beyond a life or lives in being, and twenty-one years afterwards. Of one enormous abuse of this power, and the legislation provoked by it, we shall have to speak hereafter.

Law of Mortmain.—The conflict on this point was more serious, from a political point of view, than on the other, and was also more obstinately maintained, inasmuch as these corporations, or rather that one great corporation in which most of them were included, the Roman Catholic Church, threatened to become too powerful for any Government to restrain, while it also, containing as it did the chief intellectual strength of the nation, could not be prevented from having a large share in the government itself.

Alienations to corporations by feudal tenants without the leave of the lord seem to have been originally illegal, and were expressly made punishable by forfeiture in the time of Henry III. This was evaded (among other ways) by giving leases for terms of a 1,000 years or so, which, as not implying any feudal relation, were not *real property*, and therefore did not come within the prohibition, till it was extended, in terms which were thought wide enough to cover any possible device, by a statute of Edward I. Thereupon the clergy resorted to the same fictitious actions or *common recoveries*, which were afterwards, as we have seen, used with so much success by the laity in undermining the law of entail. But the success of these legal subtleties depends, of course, more on the temper of the judge and the judges' masters than on the ingenuity of the schemes themselves; and in this matter the laity were united in interest, and not much inclined to be trifled with, so that another statute was quickly passed, providing for the trial of the real title, whether the tenant admitted the claim or not. Then the

clergy resorted to the system of *uses* already described; but this was stopped as far as they were concerned by a statute of 15 Ric. II., making *uses* subject to the statutes of *mortmain*, and forfeitable like the lands themselves, and at the same time prohibiting permanent charges on the land for such purposes as masses for the souls of the dead. After the Statute of Uses, on the reappearance of double ownership in the shape of *trusts*, the latter were necessarily free from the statutes of *mortmain*; but the evil of this was probably not immediately felt, since about the same time the Roman Catholic Church, the most dangerous offender in this respect, was first crippled by the dissolution of the monasteries, and afterwards entirely proscribed, as far as England was concerned.

In course of time, however, it was recognised that alienations even for purposes politically harmless, or really beneficial, might collectively do considerable mischief, if a person could, by a death-bed gift or bequest, enjoy the satisfaction of at once disappointing some relation whom he disliked, and handing his own name down to posterity as a benefactor; and that abuses were certain to grow up in the best-conceived foundations, where the founder's will continued to be observed under changed circumstances, which no human wisdom could have foreseen. Against the former evil a serious effort was made for the first time in the reign of George II., when a statute, commonly known as *the Mortmain Act*, prohibited altogether gifts of land for charitable purposes by *will*, and permitted them by *deed* only where the donor lived at least a year after the gift, and gave a guarantee of his sincerity by reserving no benefit whatever for himself. The danger from endowments created deliberately but unwisely, and from endowments created deliberately

and wisely, but rendered useless or mischievous by the changes of society, remained still unprovided for, except in the one particular of *superstitious uses*, which were forbidden by a law of Elizabeth.

It will have been observed that one result of these conflicts about entail and mortmain was to familiarise people with the notion of two co-existent ownerships, one legal, the other beneficial, or *equitable*; one the exclusive object of regard in the Courts of Law at Westminster, the other recognised by the Court of Chancery. The same principle was afterwards so widely extended that double ownership became rather the rule than the exception in respect of all the more permanent kinds of property. It was constantly found convenient, where temporary, partial, or conditional interests were to be created, to have one person or body of persons constituted, as it were, the permanent legal representative of the entire property, to do all acts by which all the different parties interested were to be bound, and to secure to each the measure of enjoyment meted out to him by the deed creating the arrangement. Some sort of double ownership seems to be almost a necessity, unless all but the simplest devolutions of property are to be prohibited by law; accident determined that the machinery for working the system should consist of two sets of nominally antagonistic tribunals; and the extreme indulgence shown by the English law in giving its sanction to private arrangements of all kinds will account for the greater prominence of *trusts* and *equitable estates*, as compared with any corresponding institutions in continental jurisprudence.

Limited Rights of Property.—We have hitherto been considering only the case, as to personal property of simple ownership, and as to real property of the largest *kind of ownership*, the freehold estate in fee simple; or,

what was practically the same thing after the invention of common recoveries, the estate-tail. Of limited rights over personal property there is very little to be said. Except leases for long terms of years, which were chiefly used for merely formal and fictitious purposes, the permanent forms of personal property which are now so important, such as stock in the public funds, and shares or debentures of joint stock companies, were either non-existent or quite in their infancy, so that rights limited in respect of duration, *i.e.*, less durable than the property itself, require no particular notice; and rights limited in respect of use and enjoyment depend mostly upon *contract*, which will form the subject of a distinct section.

Estates for Life—Real Property.—Among limited rights over real property we come first to the estate for life, as to which the only thing to be noticed is that *waste, i.e.*, not only such acts as opening new mines, cutting down timber, turning arable land into pasture, or *vice versa*, but even omissions to repair buildings, fences, and the like, were illegal and a cause of forfeiture, unless specially permitted by the deed creating the estate; and that even a tenant *without impeachment of waste*, as the phrase went, was liable to be restrained by the Court of Chancery from acts of gross and wanton destruction.

Copyholds.—There is more to be said about that remarkable kind of limited ownership called a copyhold estate. Originally a mere occupation-licence from a feudal lord to the villein who cultivated that part of his estate which was not granted out to free tenants,—or possibly to a free man who chose to earn it by doing for the lord a definite amount of such work as was usually done by villeins,—it had grown, in the course of ages, into a permanent tenure, varying considerably in its incidents according to the custom of the locality, and always eccentric,

but in its highest form having a practical value only a little inferior to that of full ownership. In some manors the villeins were allowed life-interests; hence arose copyholds for lives. In other manors a greater degree of liberality was shown by the lords; and, on the decease of a tenant, the lord permitted his eldest son, or sometimes all the sons, or sometimes the youngest, and afterwards other relations, to succeed him by way of heirship; for which privilege, however, the payment of a fine was usually required on the admittance of the heir to the tenancy. Frequently the course of descent of estates of freehold was chosen as the model for such inheritances; but, in many cases, dispositions the most capricious were adopted by the lord, and in time became the custom of the manor. Thus arose copyholds of inheritance. Again, if a villein wished to part with his own parcel of land to some other of his fellows, the lord would allow him to *surrender* or yield up again the land, and then, on payment of a fine, would indulgently *admit* as his tenant, on the same terms, the other to whose use the surrender had been made. Thus arose the method, now prevalent, of conveying copyholds by *surrender* into the hands of the lord to the use of the alienee, and the subsequent *admittance* of the latter. But, by long custom and continued indulgence, that which at first was a pure favour gradually grew up into a right. "The will of the lord, which had originated the custom, came at last to be controlled by it." Hence, in the time of Blackstone, the largest possible estate of copyhold, called, by analogy to freeholds, an estate in fee simple, implied some such conditions as the following.

As to use, the copyholder could cultivate the land for his own benefit, rendering little or no rent or service, and *without being liable* to be turned out; on the other hand,

the timber and minerals belonged to the lord, not to him, though the lord could not enter on the land to take them without his leave.

As to disposition, he could convey his interest absolutely to any one he pleased, but only by the circuitous and expensive process of first surrendering the land to the lord, and then procuring the admission of the purchaser as his successor, on payment of a *fine* for the privilege, which varied in amount according to the custom of particular manors, but could not, as finally determined by the judges, exceed two years' improved value of the land. He could dispose of it after his death by a corresponding process, called a *surrender to the use of his will*; but if he had forgotten that ceremony, the will was void. If he died intestate, it went to his heirs, subject to the same fine on admittance; and there was also, as often as not, a custom for the lord, on the death of the tenant, to seize the best beast on the land, under the name of a *heriot*. Sometimes the custom of the manor admitted of an entail being created, and in such cases the restriction had generally come to be evaded by devices different from those applicable to freeholds, but equally absurd.

All these transactions were punctiliously carried out in a Lilliputian court of justice, called the *customary court*, supposed to be attended by the *homage*, i.e. the other copyholders (of whom two fortunately formed a quorum), and presided over by the steward of the manor, usually the lord's family attorney, and were thereupon duly *presented* to the lord, who was then in a position to give the necessary directions. It was fortunate that no new tenures of so inconvenient a character could be created, and that they could at any time be converted into freeholds by arrangement between lord and tenant.

Servitudes.—Of the numerous limited rights in rem

which might be brought under this head, the only ones which it is important to notice in so slight a sketch as the present, are the various *rights of common*, especially the common rights in uncultivated lands. The origin of these appears to go back beyond the feudal period to the times when each little Saxon tribe lived jealously surrounded by its belt of waste land, the use of which by the members for pasture and other purposes was regulated in the general interest of the community by a general assembly, by a body of elders, or by a single chief. But we are only concerned with them in the later stage, when they appear as anomalous exceptions to the general rule of individual ownership. The view of Blackstone is, that the uncultivated land in a manor is the *lord's waste* with which he can do as he pleases, subject only to certain rights, presumed to rest upon some lost grant or tacit permission by his ancestors, widened, according to the usual fiction of English law, by immemorial custom; rights belonging almost universally to the freeholders, and generally to the copyholders, of pasturing as many cattle on the waste as would suffice to manure and stock the private land to which this right of common is annexed; sometimes also of cutting turf or taking underwood sufficient for their own consumption and the repair of their houses and fences, or even of digging for minerals. It had been declared by statute, as early as the reign of Henry III., that the lord had a right to inclose for purposes of cultivation, so long as he left common sufficient for those entitled thereto; the use made of this power in Tudor times, especially in the reign of Edward VI., gave rise to serious discontents and actual outbreaks; but in the reign of George II. nothing had occurred to attract particular attention to the subject, which is accordingly dismissed by the learned commentator in very few paragraphs.

Leases and Mortgages.—Of all possible rights and interests in land, there are probably none which, in a country like England, concern a larger number of persons than these two, about which nothing has yet been said, but, though these are under one aspect rights of property, it will be more convenient to treat them under their more important aspect as rights against individuals, arising out of contract, especially as we should otherwise have the troublesome, and for our present purpose unprofitable, task of defining their anomalous position on the borderline between real and personal property.

In concluding our description of the power of disposition implied in various kinds of ownership, it should be stated that in the time of Blackstone, the power of disposition by will had become (what it had not always been) co-extensive with the power of disposition in the owner's lifetime, with the single exception of the devises prohibited by the Mortmain Act of Geo. II. (p. 29).

Title to Real and Personal Property.—This may arise in the following ways:—(1.) By the act of a previous owner: this has already been considered, so far as relates to the previous owner's right to transfer, with or without conditions; it only remains to deal with the formalities necessary to vest the property in the new owner. (2.) By inheritance from the previous owner in due course of law, without any act on his part. (3.) By operation of law adverse to the previous owner. (4.) Without reference to any previous owner.

Formalities of Transfer.—The thing to be transferred being a right available against all the world, evidently the object to be aimed at is in some way to give notice to all the world, at least that part of it which is likely to have dealings with the parties. This object was kept in view with tolerable steadiness as far as the

common law was concerned, regard being had to the limited range of intercourse and defective means of publication in the ages in which its rules were framed. For personal property in the shape of movables, to which the ancient law attached little importance, the rule was that in a *gift*, actual delivery, or as near an approach to it as the nature of things would admit of, was necessary to transfer the ownership, but that in a *sale* the contract was in itself a transfer; but then a mere verbal agreement was held to be no contract unless there was either a tender or part payment of the price, or a tender or part delivery of the goods, or an agreement to postpone payment or delivery, or both; so that the difference was not after all so wide as it might seem at first sight. With respect to goods sold for £10 or upwards, further requirements were added by the well-known Statute of Frauds, in the reign of Charles II., namely, that in the absence of part payment there must be either part delivery, followed by acceptance and actual receipt on the part of the buyer, or else a memorandum in writing signed by the parties or their agents. Besides these methods of delivery and sale, the ownership of any kind of personal property might be passed with or without consideration by *deed*, *i.e.*, a written instrument signed, sealed, and formally delivered to the intended recipient. As to real property, where the rights to be transferred were what are called *corporeal*, *i.e.*, such as imply actual physical contact with and use of the soil, it was anciently required that a formal and public delivery of possession, called *livery of seisin*, should accompany the *feoffment*, or declaration of the rights intended to be transferred. "The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may be as effectually done by deputy or attorney as by the principals

themselves in person), come to the land, or to the house; and there, in the presence of witnesses (properly the freeholders of the neighbourhood), declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: 'I deliver these to you in the name of seisin of all the lands and tenements contained in this deed.' But if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others." If the rights to be transferred were *incorporeal*, that is, if actual physical contact with the soil was either not involved at all, as in the case of an advowson or a rent-charge, or only occasionally or in a particular mode, as in the case of a right of way or other servitude, the formalities above described were considered inappropriate, and the transfer was made by *grant*, in other words, by deed. The use of the terms *corporeal* and *incorporeal* to describe different kinds of rights, as though any right could be grasped with the hands, was certainly fanciful; but the rules in themselves were sufficiently simple and logical—public notice to the neighbourhood of the person who is to have the general rights and duties of ownership—private but permanent recording of any special and limited rights which other persons may have in relation to the same subject. But this ancient simplicity had been gradually overloaded by new inventions till it was almost lost sight of. These, for the most part, grew out of the fact that the chancellors persistently refused to see the difference between a right *in rem* and a right *in personam*, in other words, between

a conveyance and a contract; in their eyes, if A had contracted (for a consideration) to convey land to B with the proper formalities, B, on payment of the purchase-money, became at once the owner, so far as they could make him so; that is to say, he had the *use* of the property. Then came the Statute of Uses, declaring that the use should carry with it the legal ownership, and thus it seemed to be settled that real property, with all its complex aggregate of feudal rights and duties, could be transferred by a mere private contract,—*bargain and sale*, as it was called,—with scarcely more trouble, and no more publicity, than a horse or a sack of potatoes. But the security for publicity thus lost was replaced in a form more suited to modern civilisation, viz., registration; a statute was passed in the very same year requiring all such *bargains and sales* to be made by deed regularly enrolled. It might seem that purchasers would now have no choice between the ancient publicity by *livery of seisin* and the modern publicity by registration; but the lawyers were again too much for the Legislature. They first *bargained and sold* to the purchaser a lease for a year, which was too small an interest to require registration, and yet was enough under the Statute of Uses to give a fictitious possession without any actual entry; after which, as it would have been contrary to principle to give formal livery of seisin to one who was already in possession, a simple deed of release was all that was necessary in order to make over the remaining rights of ownership. So high a value seems to have been set by landowners on privacy in their conveyances, that this strange, circuitous, and of course expensive process became and remained more common than either the feoffment with livery of seisin, or the bargain and sale with enrolment. The counties of York and Middlesex obtained special acts for a new system of

registration of deeds; but here, as in so many other cases, the broad rule of law giving priority to registered deeds was frittered away by the refinements of the Court of Chancery, so that we are not surprised to find Blackstone doubting whether the system did not cause more disputes than it prevented.

The method of conveying copyhold estates has been already described.

Blackstone reckons up fourteen distinct methods of conveyance employed in his time; but many of them are mere varieties of conveyance by deed, and we may consider that we have now exhausted the methods of transferring the *legal ownership* of real property; but from what has been already said about the ways of the Court of Chancery, it will readily be understood that they by no means abandoned their control over the *beneficial ownership*. Equity still "considered that as done which ought to be done;" and therefore no sooner was there a contract for a sale of lands in any shape whatever, and the purchase money paid or tendered, than the previous owner found himself in the position of a mere trustee for the purchaser, who could enter upon the land, under the protection of the Court of Chancery, live on it, and enjoy the profits, in fact do everything except bring an action as owner in a common law court, and could at any time obtain a decree compelling the previous owner to make him a legal conveyance.

Of the formalities required for transfer by *will* there is not much to be said. The Statute of Frauds required a will of freehold property to be in writing, signed by the testator, and by no less than three witnesses in his presence; and such a will had the further peculiarity that it applied only to land which belonged to the testator both *when he executed the will* and when he died; whereas a

will of personal property was understood to speak from the death of the testator, and required neither witnesses nor the signature of the testator—nay, in the case of property under £30 it might be made by word of mouth. There were also remarkable variations as to the mode of giving effect to the will after the death. The will of real property passed the property directly to the person therein named, the *devisee*, as he was called, and all proceedings necessary for establishing its validity or carrying out its directions took place in the common-law courts, unless there were *trusts* in it which required the intervention of the Court of Chancery. The will of personalty came ordinarily under the jurisdiction of the ecclesiastical courts, though here also there might be occasion for Chancery interference. Moreover, many more processes had to be gone through before the property, or what remained of it, could reach the hands for which it was intended. First, the whole had to be vested in one or more representatives of the deceased, who might without impropriety have been called trustees, but happened (probably because their office was older than the invention of trusts) to be called by a different name—*executors*, if appointed by the testator, *administrators*, if appointed by the Court. It was the duty of this executor or administrator, first, to produce the will and satisfy the Court of its validity; then to make an inventory of the property, and collect the debts due to the testator; then to pay out of the *assets* so collected (1) the funeral expenses of the deceased; (2) his debts, according to a peculiar order to be presently noticed; (3) the legacies given by the will to particular individuals, helping himself first if he happened to be one of them; (4) the residue, if any, and if there was any person designated *in the will as residuary legatee*; if not, he was allowed by a

kind of very rough justice to take it for himself, unless he had already taken a legacy under the will. If the property proved insufficient to meet all the demands upon it, he would have to make a proportionate reduction, equal as between recipients of the same class, but always exhausting the lower class before going to a higher; legatees, for instance, before debtors, and ordinary debtors before the more favoured ones. Until all this was accomplished, he represented the property for all purposes, all actions in respect of it being brought by or against him, and the entire management being in his hands.

Inheritance.—We may now quit the subject of voluntary transfers, and come to the laws of inheritance. Here the distinction between real and personal property is even more marked than in the other matters we have been treating of.

To take the simplest rules first, those for the distribution of the personal property of an intestate were thus settled in the reign of James II., since which time they have never been altered.

(1.) The widow takes one-half, if there be no child, or descendant of any child; otherwise one-third.

(2.) The children take equally, subject to the share of the widow; the children of any deceased child collectively represent their parent.

(3.) In default of descendants the father takes the whole, or if there be a widow, one-half.

(4.) Next come the mother, brothers, and sisters, equally; children of a deceased brother or sister representing their parent, provided the mother or any brother or sister be living.

(5.) Other next of kin *ad infinitum*, those in equal degree of kindred taking equally, and excluding all who are *more remote*.

Except in the case of the father, no preference was given to males over females, nor to the whole blood over the half-blood. It will be noticed that there is mention of a widow, but no mention of a widower; the reason being that a married woman's property passed to her husband on the marriage, and of course remained his at her death; she might, indeed, have the beneficial ownership of property vested in trustees for her, but the disposal of that would depend, not on the general rules of law, but on the terms of the instrument which created it, the usual arrangement being to the wife for life, then to the husband for life, then to the children, if any, and in default of children to those who would have been her next of kin if she had been unmarried.

Real property, on the other hand, was not distributed, but *descended* in almost every case to a single individual, in an order of which the following were the most striking peculiarities:—

I. Males were in all cases preferred to females, sons to daughters, brothers to sisters, &c. The widow had no regular place in the order of succession, but had an estate for life in one-third of her deceased husband's lands, under the name of *dower*, of which she could not be deprived by his will, or even by alienation in his lifetime. On the other hand, on the succession to a wife's lands, the husband took, as *tenant by the curtesy*, a life-estate in the whole, legal as well as equitable, provided that there had been issue born of the marriage capable of inheriting; whereas dower attached to the legal estate only, and was subject to other awkward restrictions.

II. Among males in equal degree, as sons, brothers, &c., the eldest only inherited; but the females all equally. These rules seem to follow naturally, if not inevitably, *from what has been already stated as to the original*

nature of real property, viz., that it was a quasi-political status,—as distinctly political as any status could be when politics were entirely an affair of private interest, and the idea of “a commonwealth” was unknown except here and there in isolated cities. The feudal tenant was a viceroy or military lieutenant in relation to his lord; in relation to his brothers and sisters he was the guardian and representative of a little community, whose success in the general scramble, and even whose existence, depended on their union under a single head; and there were obvious reasons, in the interest of the tenants still more than in that of the lords, why that single head should be the eldest male rather than any other. It did not follow, and it was doubtless never intended, that the others should therefore be excluded from the enjoyment of the estate, though that result actually happened in consequence of the gradual change from vassalage to private ownership. That the position of younger brothers should thereby become more dependent, and that the elder brother should fail to recognise in this altered state of things a reason for equal division, is only what we should expect from our knowledge of average human nature, though doubtless such a division would have had, as Blackstone quaintly expresses it, “the appearance, *at least in the opinion of younger brothers* (and he might have added, of sisters), of the greatest impartiality and justice.” The large power of disposition, both in his lifetime and by will, which as we have seen was vested in owners in fee simple, might have been, and was to a considerable extent, used to rectify this injustice; but the desire to found and perpetuate a powerful family operated strongly in the other direction, especially in the case of large estates.

III. *Fathers and other lineal ascendants were altogether*

excluded; a rule for which Blackstone's ingenuity is severely taxed to find a reason.

IV. The course of descent was traced, not immediately from the last owner, but from the last person who acquired by a title other than descent—the original “purchaser,” as he was called. Hence, lands inherited by the intestate from his mother's side could only descend to his mother's relations, and conversely.

V. Brothers and sisters, and other collateral relations of the half-blood, were altogether excluded.

The devolution of an estate-tail was the same as far as it went; but on failure of lineal descendants, or in some cases of lineal male descendants, it stopped altogether, and the estate reverted to the heirs of the original grantor. Other systems of descent, relics of times anterior to feudalism, continued to exist as local customs in different parts of the country; the most remarkable being that of gavelkind in Kent, under which all the sons, and in default of children, the brothers, inherited in equal shares, and that of borough-English, in the city of London, under which the *youngest* son alone inherited.

Acquisition by Title adverse to the previous Owner.—One way in which this may take place is by *forfeiture*. This may be incurred either as part of the punishment for a crime, or, in the case of a partial owner, on breach of the conditions under which he held his property. Forfeiture as a punishment we shall deal with elsewhere, only noticing here that the benefit of it accrued, in case of treason, entirely to the Crown as to both real and personal property; in case of felony, to the Crown entirely as to personalty, but as to realty only to the extent of a year's profits, the lands then going to the lord under the title of *escheat*, the felon being incapable of *transmitting* anything to his heirs. Civil forfeiture

for breach of condition present no special features of interest.

Another title adverse to the owner is that of a *creditor*, who takes his debtor's property in satisfaction of the debt; which might, no doubt, be called a *title by forfeiture*, were it usual to do so. This title may accrue, apart from rights arising out of express contract, in at least three different ways, viz., (1) distress, (2) execution through the sheriff, (3) bankruptcy, (4) administration, *i.e.*, distribution of the effects of the debtor after his death. Title by *distress* was of a very limited, temporary, and partly fiduciary character. Anciently it was merely the right of the landlord when rent was in arrear to seize any moveable property, with certain exceptions, found on the land or in the house in question, and not grossly out of proportion to the amount due, and to keep it till the rent was paid; but, shortly before the time of Blackstone, the powers of the landlord were largely increased, and he was allowed, though only after waiting five days, and under official superintendence, to sell the thing distrained, satisfy his own claim out of the proceeds, and hand over the surplus, if any, to the tenant. One remarkable feature of this law was, that the goods of a sub-tenant, found on the premises of a defaulting tenant (the furniture of a lodger, for instance, in apartments let unfurnished), might be taken in satisfaction of the rent due from his immediate landlord to the superior landlord.

With regard to *execution*, considered as a title to property, the points to be noticed are, that it extended in one form to the debtor's personal property generally, but excluding money and written securities for money of all kinds, such as bonds and bank notes, on the ground apparently that the object of the taking was to sell, and money *could not be sold*, and that securities were only valu-

able as *choses in action*, and therefore not property. *A fortiori*, the sheriff could not take any steps for recovering a debt due to the defaulting debtor from some third person, except under a peculiar custom of the city of London. In another form it extended to taking the rents and profits of land through the sheriff; in a third form, to the possession of *half* the land itself, not to be sold, but to be held till the debt was made up out of the rents and profits. The limitation to half the land was on the theory that the creditor could neither force himself on the feudal lord as tenant in lieu of the debtor, nor disable the latter from rendering his feudal services. Copyhold lands could not be made available in any way for payment of debts, being theoretically the property of the lord. It will be seen, therefore, that considerable caution was necessary in giving credit or lending money to apparently substantial landowners, and that it was not very easy for an ancient family to ruin itself by extravagance, though the object might doubtless be accomplished by an actual sale or mortgage of the estates.

This remark will be confirmed by an examination of our next source of title, that by *bankruptcy*, *i.e.*, where a debtor is discharged, wholly or partially, from his liabilities on giving up his whole property to be equitably divided among his creditors. This was only allowed in the case of a *trader*, defined as a person who habitually seeks his living by buying and selling, and practically limited to those who traded on a considerable scale; since it was necessary to show a debt of £100 to one creditor, or debts of larger amount to more than one. All other persons could in no possible way, except by payment in full, extricate themselves from the consequences of insolvency, *viz.*, execution of all property liable to that *process*, and imprisonment for any length of time, gene-

rally at the expense of the public (supposing the debtor to have nothing); but in case of a debt not exceeding £100, and a complete surrender of property, this imprisonment was at the expense of the creditor. Blackstone speaks of this distinction as a privilege accorded to traders, on the ground that "they are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own," while he speaks with very proper severity of gentlemen who either contract debts without having the means to pay them, or delay payment when they have the means. This, no doubt, was the main ground of the distinction; but it also had another operation, to which a land-owning Legislature can hardly be supposed to have been blind, in preventing ancient estates from being brought into the market, since it would not have been tolerated that debtors should get a discharge in bankruptcy without giving up their lands, which, nevertheless, could not, as we have seen, have been taken by any other means. In fact, real property was actually taken and sold on the bankruptcy of a trader.

Title by *Administration* resembles in principle that of bankruptcy, the discharge of the debtor from further molestation by his creditors resulting in the one case from the favour of the law, in the other case from an event beyond human control. But, whereas the former applied only to the property of *trader-debtors*, and to *all* their property, real as well as personal, the latter applied to the property of *all* deceased debtors, but to the *personal* property *only*, unless the deceased had expressly directed otherwise. Another important difference was, that in bankruptcy all creditors were entitled to share equally in proportion to the amount of their claims; in *administration* a complicated and capricious order of

priority was followed. The preferences most worth noticing were (1), debts due to the Crown, the very class of which the non-payment would be least felt by any one; (2), debts of record, *i.e.*, declared to be due by decree of some court, though, unless it were to encourage litigation, no reason could be given for considering such a debt better established than one which had never been disputed; (3), arrears of rent, a preference best accounted for by remembering that most of our laws had been made by landlords; (4), debts due on speciality contracts, *i.e.*, those expressed in a deed, signed, sealed, and delivered.

Title by judgment of a court of law or equity, needs no particular description. The use made of such decrees, through the fictitious proceedings, called fines and common recoveries, has already been noticed.

(4.) *Acquisition without reference to any previous owner.*—It may be a question whether we should class under this or the previous head what may be called, in non-technical language, *ancient possession in good faith*. Doubtless it so far has reference to a previous owner, that it is always set up to bar the claim of some one who professes to have been the owner; but the ground assumed by the ancient possessor is not "I admit that you were the owner, but you have lost your right through lapse of time," but "whether you were owner or not it is too late now to inquire." This right is set up technically under two distinct names, *prescription* and *limitation*; properly speaking, the former creates a positive title, while the latter only acts negatively by barring adverse claims, but the distinction can but rarely be of any practical importance. The time within which this right could be acquired was different according to the nature of the subject-matter, and also according to the nature of the adverse claim, *viz.* :

For the ownership of land (limitation), *sixty* years where the claimant undertook to prove an absolute, indefeasible title; *twenty* years when he only undertook to prove that he had a better title than the possessor, *fifty* and *thirty* respectively in certain other cases.

For rights of way, rights of common and other servitudes (prescription), a continually lengthening period, dating from the reign of Richard I., called the time of legal memory; and the same for customs, which only differ from rights by prescription in belonging to classes or localities instead of individuals.

For personal property (limitation), the general period was *six* years.

There was one person, however, against whom no one was safe, however long his possession, or whatever the subject-matter, the maxim being "*nullum tempus occurrit regi.*" The lawyers might have left this maxim, like so many others, to be justified of itself; or they might have derived it from the fiction that "the king never dies," therefore his rights must be as immortal as himself; or equally well from the fiction, that "the king can do no wrong," therefore cannot have neglected to press his claim at the proper time; but they preferred to excogitate a new and certainly ingenious theory, to the effect that "the king is always busied for the public good, and therefore has not leisure to assert his right in the time limited to subjects." It would have been neither ingenious nor courtly to state the simple fact, that, in the long scramble for power and pelf between this immortal being and his subjects, he had had the luck to grasp and to keep this particular perquisite.

Occupancy.—The only title remaining to be noticed is that of actual possession, or occupancy, which is generally recognised as valid against any one who cannot show

any other legal title. Blackstone amuses himself by imagining the course of its development in that "state of nature" which seems to have exercised such a fascination over the contemporaries of Rousseau. Its range has been grievously restricted since those days, though we cannot admit, what the learned commentator appears sometimes to intimate, that in England everything had, or has, an owner which is capable of ownership, the Crown or the lord of the manor taking everything which does not belong to any one else. It has been shown conclusively that this can never have been the case, except as to certain animals and things particularly specified, viz., whales and sturgeon, *treasure-trove*, i.e., treasure hidden by an owner who has never returned to claim it; *waifs*, i.e., property stolen and thrown away by the thief in his flight, where the owner has neglected to pursue; *estrays*, i.e., valuable animals which, having strayed, are not claimed by their owners within a year and a day, with perhaps a few other miscellaneous articles. Fish, for instance, other than the "royal fish" above mentioned, caught in navigable rivers or at sea, within British jurisdiction, have never been supposed to belong to any one but the captor, nor would the Crown succeed in a claim for the agates and cornelians picked up by strollers on the sea shore.

Accession, i.e., the title which the owner of a thing has to everything produced from it, or which is contained in it, or naturally attaches itself to it, is really only a species, and the most practically important species of occupancy, though often treated as distinct. There was nothing, however, in the English law on the subject so peculiar as to call for special notice.

II. CONTRACT.

Law of Contract.—The state of this part of the law in the time of Blackstone is thus described by the biographer of the great judge (Lord Mansfield), who at this very time was just entering upon the task of supplementing its deficiencies :—

“In the reign of George II., England had grown into the greatest manufacturing and commercial country in the world, while her jurisprudence had by no means been expanded or developed in the same proportion. The legislature had literally done nothing to supply the insufficiency of the feudal law to regulate the concerns of a trading population; and the common-law judges had, generally speaking, been too unenlightened and too timorous to be of much service in improving our code by judicial decisions. Hence, when questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine assurances, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports, which swarmed with decisions about lords and villeins, about marshalling the champions upon the trial of a writ of right by battle, and about the customs of manors. Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves. If an action turning upon a mercantile question was brought in a court of law, the judge submitted it to the jury, who determined it according to their own notions of what was fair, and no

general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes."

In short, the defects of our old law of contract were more those of omission than of commission; what there was of it was comparatively simple and rational, and affords proportionately scanty material to the historian. Among its positive defects we may class the preference already mentioned (p. 48) as given to *specialty* over *simple* contracts in administration; the further privilege allowed to the former, of being enforceable without such proof as was in other cases required of some advantage to accrue to the promisor as the consideration for his entering into the contract, may perhaps be justified. The principle introduced by the famous Statute of Frauds, in the reign of Charles II., of requiring certain contracts, either peculiarly burdensome or peculiarly open to misconstruction, to be evidenced by writing, and the signature of the party to be charged therewith, or his agents, before any action can be brought upon them, seems in itself sound and wise; but the rules were unfortunately so expressed as to give some colour to the oft-quoted retort, that if "every line of the statute was worth a subsidy," every line had also cost a subsidy in litigation.

Void Agreements.—In every system of law there must be a line drawn somewhere between agreements which are, and those which are not, enforceable as legal contracts. No government was ever so bold as to hold every one to his word, whatever foolish, wicked, or impossible thing he might have undertaken to do, and only the most uncivilised (if any) have ever entirely refused redress to sufferers by breaches of faith. In England the line was drawn on the whole with tolerable steadiness and good sense, the most noteworthy aberrations being *the following* :—

(1.) An agreement to pay a high rate of interest for a loan—in Blackstone's time anything over 5 per cent.—was reprobated under the name of *usury*, and was held to be unenforceable as against public policy—some said as being against the law of God.

(2.) *Bets* were positively illegal, and punishable if made upon any illegal sport, or upon any race or game whatever, for more than £10, and in some other cases; but in all cases in which they were not punishable, the payment of them could be enforced by action like any other contractual obligation, and the judge was bound to consider them with such patience and gravity as he could command, unless, indeed, the inquiry could be shown to be actually injurious to the public, or to the interests, feelings, or reputation of a third person, and even these exceptions had not been fully established when Blackstone wrote.

Among the infinite varieties of legal contracts, the following are sufficiently common to have acquired special names, and to have had a good many of their incidents defined beforehand by the law.

(1.) *Sale*—or exchange, already discussed as a mode of acquisition (p. 35).

(2.) *Deposit*—i.e., agreeing to take another person's property, and keep it or employ it in some way for his benefit. This was called *bailment* when applied to personal property, and when the contract professed to be what it really was. When the nominal ownership was transferred as well as the possession, which was sometimes done in respect of personal, and generally in respect of real property, it was called a trust, and as such was a contract only cognisable in a Court of Equity.

(3.) *Loan*—which speaks for itself.

(4.) *Pledge or mortgage*—a species of contract always

collateral to some other contract, usually a loan; the agreement being that the pledgee shall keep the thing pledged until the main contract has been performed, and, generally, that after a certain interval he may sell it and indemnify himself out of the proceeds for the non-performance. Looking to the substance of the matter, a mortgage only differed from a pledge proper in that the conditional control of the mortgagee over the thing pledged rested on a mere understanding, without any actual transfer of possession. But, historically, under the English law, it was derived from a very different transaction, by which the actual legal ownership was transferred, to be re-transferred on performance, but to be retained in case of non-performance of the principal contract; so that if a land-owner, for instance, had in a time of necessity mortgaged his estate to a money-lender, and failed to repay principal and interest on the exact day named in the deed, the land, perhaps far exceeding in value the sum actually due, would belong for ever to the money-lender without any possibility of redemption. The Court of Chancery had considered this oppressive, and had been in the habit of enforcing instead of it what it conceived to be in each case the fair arrangement; but the formal transfer remained, and produced a variety of entanglements, with a good deal of practical injustice, over and above the principal grievance, that one of the commonest of business transactions could only be effectually dealt with in London, and in the most expensive of Courts.¹

(5.) *Hiring*.—This contract, like the two preceding ones, has nearly, if not quite, as much to do with the law

¹ This intervention took place a few years later than the first representation of Shakespeare's "Merchant of Venice," so that the strict enforcement of Shylock's bond is not a bad caricature of English law as the poet knew it.

of property as with that of contract, being, in fact, a contract to pay so much in consideration of a conditional and temporary transfer of a considerable part of the rights of ownership. More especially is this the case with the hiring of land or houses; such *tenancies* are only distinguishable by a very fine and arbitrary line from the *tenures* or *estates* of real property law. They were, in fact, generally spoken of by lawyers as *personal property savouring of the realty*, or *chattels real*. The importance of this kind of contract may be gathered from the fact, that of the whole soil of England only a very small part had anything to do with its legal owners, except that they extracted a rent from it, and determined who should live on it; the actual inhabitants and cultivators, and even those who superintended the cultivation, being lessees or tenants of one kind or another. The case was nearly the same, *mutatis mutandis*, with regard to house property in towns. The main fact that the relations between the different persons having an interest in the soil were determined far more by special contracts than either by custom or by positive law, and by contracts based on the assumption that the superior landlord was the only proprietor, and might, if his terms were not accepted, have no tenants at all, and surround himself with a desert, is well deserving of notice, inasmuch as Great Britain appears to differ in this respect from every other country in the world. That the contracts made under such circumstances should be generally more favourable to the supposed interest of the landlord than to that of the tenant, that the presumptions made by Courts of Justice as to the intentions of contracting parties, when not formally expressed, should be of the same character, and that more stringent legal remedies *should be given against non-payment of rent by a tenant*

than against most other breaches of contract, was only what we should expect. We have more reason to be surprised at the moderation with which the powers of the landowning class, theoretically so enormous and crushing, appear in general to have been exercised.

Hiring of personal property calls for no particular remark.

(6.) *Service*.—Here, again, the English law differed from those of all ancient and many modern nations, but this time on the side of liberality, in making the relation of master and servant depend almost, if not entirely, on a free contract. Except paupers, the children of paupers, and criminals, every one was ostensibly free to work for any one, or for no one, as he pleased, and to make the best bargain that he could for his services. Practically, however, this liberty was considerably restricted (1), by the laws against vagrancy, hereafter to be noticed; (2), by laws strictly prohibiting combinations among workmen to raise the rate of wages; and (3), by laws making the breach of a contract of service not merely a civil injury, but in many cases a punishable offence.

Our limits will not allow us to do more than barely remind the reader of the existence of such contracts as *agency, partnership, insurance, indemnity, and guarantee* (or *suretyship*).

Two instances of the kind of obligation, which we have called quasi-contract, deserve special mention on account of their subsequent history.

Innkeepers were held at common law, from the very fact of their undertaking to receive strangers generally, to be bound to receive and entertain any stranger who might present himself for whom they had suitable accommodation; and they were also liable for the loss of any property deposited by a guest in their house, though they *might never have promised to take care of it*. So also

Common Carriers, i.e., those who held themselves out as generally ready to convey goods for reward, were treated as having contracted also to convey them safely under all circumstances, so as to be liable for every loss or damage occurring otherwise than by inevitable accident.

III.—ABSOLUTE DUTIES.

These are those which have for their immediate object, (1), the good of the State; (2), God, religion, or some abstract ideal; or (3), the good of the very person bound by them. So far as such duties are negative they will be best described further on, in connection with the violations of them.

Public Duties.—Of positive services rendered directly to the State there would be more to be said if this were a history of the Constitution; as it is, it will be sufficient just to remind the reader that the revenue-laws and the law of impressment furnish some of the most exciting chapters to the criminal records and romances of the period. Duties imposed for the sake of public justice belong to Procedure; but this seems the proper place for a remark upon the mode of dealing with that general obligation which binds every individual, who is strong enough, to stop a fight, to prevent a crime being committed in his presence, and to arrest the criminal. Though this duty is usually spoken of in English law books as a legal as well as a moral one, not only was it, and is it, enforced by no definite penalty, and encouraged by no reward, but even the *right* of interference was, and is, limited by such arbitrary and unintelligible distinctions, as gratuitously to supply every man with an excuse to his own conscience for indulging his natural indolence or timidity, lest he should *himself* be breaking the law. Of other positive

duties towards the community at large, sanitary, registrative, and the like, we may remark generally that the England of Blackstone stood distinguished, for good or for evil, from most other civilised states, and from itself at other periods by the rarity and laxity of such requisitions.

Religious Duties.—The only positive and general requirement of this kind—unless we reckon taxation for Church purposes—was that of every Sunday attending some place of worship belonging to the Established Church, or else, as a matter of special indulgence under the Toleration Act of William III., a duly certified meeting-house belonging to some recognised sect of Protestant Dissenters.

Absolute positive duties of a purely self-regarding nature had no place in our legal system. Peter the Great might shave his Russians, but no such feat was likely to be attempted by the British Parliament.

CHAPTER III.

WRONGS AND REMEDIES, CIVIL AND CRIMINAL

I. GENERAL FEATURES OF THE SYSTEM.

Ideas of the Age on the Subject.—In Goldsmith's "Citizen of the World," published about 1760, we read as follows:—"There is scarcely an Englishman who does not, almost every day of his life, offend with impunity against some express law, and for which, in a certain conjuncture of circumstances, he would not receive punishment. Gaming-houses, preaching at prohibited places, assembled crowds, nocturnal amusements, public shows, and a hundred other instances, are forbid,—and frequented. These prohibitions are useful; though it be prudent in their magistrates, and happy for their people, that they are not enforced, and none but the venal or mercenary attempt to enforce them. The law in this case, like an indulgent parent, still keeps the rod, though the child is seldom corrected. Were those pardoned offences to rise into enormity, were they likely to obstruct the happiness of society, or endanger the State, it is then that justice would resume her terrors, and punish those faults she had so often overlooked with indulgence. It is to this ductility of the laws that an Englishman owes the freedom he enjoys, superior to others in a more popular Government."

The above eulogy, nearly contemporaneous with the

first appearance of Blackstone's Commentaries, and quite in the style, if we except grammatical irregularities, of that author himself, may fitly illustrate at once the confusion—and profusion—of laws, and the confusion of thought on political subjects, which characterised the pre-Benthamite period. Georgian England had certainly travelled far enough from primitive barbarism, if it is, as has been said, a mark of that social condition to have a large list of civil injuries and a small list of crimes; in other words, for the community to think, when it interferes at all, not of the general interest in punishing the offender as a warning to others, but merely of what will satisfy the enraged individual who has been injured. We had, in fact, gone into the opposite extreme, that of multiplying punishments too severe to be consistently carried out, so that no one could feel safe, and no one need despair of impunity, while the provision for compensating the immediate sufferers by offences was miserably inadequate. If an offence was only great enough to rank as a *felony*, the injured person might give up all hope of any more substantial satisfaction than that which he might derive from the punishment of the offender. If he tried to bring a civil action, he was told that this would only be entertained after the public interest had been served by a criminal prosecution; after prosecution and conviction, his adversary was most probably hung, and, at all events, forfeited all his goods to the Crown, so that a civil action could not possibly produce any beneficial results. It was only for the smaller offences, called *misdemeanors*, that the sufferer might proceed civilly or criminally at his discretion. It is proposed first to enumerate the different kinds of legal remedies and punishments, and then to treat of the offences to which they were severally *applied*.

Civil Remedies.—In a few cases the sufferer was allowed to right himself. He might repel force by force in the case of an assault upon himself, his wife, or his child, or of an attempt to take away his or her property. He might remove a trespasser from his house or grounds, so it were done without violence. He might retake his property when wrongfully taken away if he had an opportunity of doing so without provoking a breach of the peace. He might personally remove an obstruction to his right of way, or pull down any erection which wrongfully caused him annoyance. He might seize his tenant's goods as a security for unpaid rent, or impound his neighbour's cattle if they strayed into his fields; or he might retain his employer's property left in his hands until paid for labour expended upon it. But, generally speaking, he had to seek his remedy in a Court of Law, and that remedy could in general only be given in one form, that of a sum of money. Whatever his grievance, whether his reputation had been blasted by a malignant falsehood, or his eye blackened in a scuffle, or his wife or his daughter seduced, he had to estimate the injury in £ *s. d.*, and that, and nothing else, was what the Court would award him.

Pains and Penalties.—In the penal *pharmacopæia* there was somewhat more variety. The list of punishments known to the laws in the reign of George II. is as follows:—

1. Death in public, accompanied with torture, mutilation, and posthumous insult; the sentence being that the criminal be drawn on a hurdle to the place of execution, that he be hanged by the neck, and then cut down alive; that his entrails be taken out and burned while he is yet alive; that his head be cut off; that his head and quarters be at *the king's disposal*. This punishment was actually car-

ried out (for the last time) in all its details in the reign of which we are speaking, in the case of some of those convicted of participating in the rebellion of 1745; but it had long been more usual—and the practice was followed in all but a few cases on that occasion—to remit all the sentence except the beheading and the disposal of the head. The heads of the traitors were set up over London Bridge.

2. Death in public by burning alive; this had been the punishment for heresy down to the reign of Charles II, and was still the legal punishment for treason by a woman; the last instance of its being actually carried out was that of Elizabeth Gaunt, in the well-known “Bloody Circuit” of Judge Jefferies, under James II.

3. Death in public by hanging, which, in case of murder, was followed by dissection for the benefit of anatomical science, under an Act passed just before Blackstone wrote. Sometimes the body was hung in chains till it rotted, near the spot where the crime was committed.

N.B.—Death could never be legally inflicted otherwise than in public.

4. Mutilations of various kinds are reckoned by Blackstone among legal punishments, but were practically obsolete.

5. Whipping, public or private, applicable in both forms to both sexes.

6. The pillory; which might be a form of popular ovation, or a punishment only a degree short of death, according to the temper of the bystanders. The offender was enclosed in a wooden framework attached to a pillar, in some public place, with apertures through which his head and his hands were protruded.

7. The stocks; a punishment of very similar character, *but involving somewhat more physical discomfort and*

somewhat less public ignominy, being used more in rural parishes than in cities.

8. To be placed in the "cucking-stool" and plunged in the water—reserved to one sex and to one special offence.

9. Imprisonment; we shall have more to say hereafter as to how this punishment was practically carried out.

10. Transportation.

11. Exile simply, in the shape of "abjuration of the realm;" but this was only as an alternative sometimes permitted in lieu of capital punishment, never actually pronounced as a formal sentence.

12. Forfeiture of all the offender's property, real and personal, usually accompanied by *corruption of blood*; by which highly figurative expression was meant that no one could establish any legal right by tracing his descent from or through the offender.

13. Forfeiture of the offender's *personal* property, generally with the addition of a year's profit of his lands.

14. Fines.

Besides these positive punishments, it was then, as now, a common practice to require an offender or suspected person to find sureties for his future good behaviour.

Imprisonment requires a more detailed notice. The regular English prisons were of two kinds. There was the common county gaol, used indiscriminately for accused persons detained before or during trial; for criminals sentenced to some other punishment, in the interval between judgment and execution; in some cases for criminals sentenced to imprisonment as a distinct punishment; and for insolvent debtors. There were also Houses of Correction, popularly called *bridewells*, which were the proper, though not the universal, receptacles for those whose punishment was to consist in the confinement itself. There was some difference between the two, but of both it may be said

generally, that they hardly pretended to answer any purpose whatever except, on the one hand, that of simple detention, and on the other hand, that of making the inmates at all events sufficiently uncomfortable not to wish to enter them again. In buildings, for the most part unhealthily situated and ill-constructed, all the prisoners alike, without distinction of age, sex, or character, including, of course, in both kinds of prison young persons who had committed some trifling offence, and in the common gaols persons with no moral stain whatever, were herded together in the daytime, and might, or might not, have separate cells at night. They had, as a rule, no honest means of employing themselves; in the bridewells hard labour was often part of the sentence, but either from the lack of means of supervision, or from the supposed danger of entrusting the prisoners with tools, it was the exception when any work was actually done. Much less was there any provision for religious or other instruction. On the other hand, gaming and fighting were allowed to go on without interruption, and the gaolers made a profit of selling spirits to the prisoners. But if the moral conditions were such as to send out every inmate more hardened and cunning in vice, more ignorant of everything useful, than when he went in, the physical conditions were such as to secure that a large percentage should never come out at all, or should come out only to die. The construction of the buildings, the close packing of the inmates, the absence of cleanliness and of all sanitary precautions, and, above all, the fact that the prisoners were reduced to the very verge of starvation, unless they were able to buy food, or obtain it from private charity, combined to engender a disease regularly known as the gaol-fever, which was unknown in any other civilised country. Its effect on the prisoners may be guessed from the facts that the

gaolers themselves never entered the cells when they could possibly help it; that there were instances of judges who sickened and died in consequence of visiting the prisons in course of their duty, and that terrible havoc was made in our ships of war by some released prisoners carrying it with them when they were impressed for the navy. Some materials for reflection on this state of things must have been supplied to the public by the description in Goldsmith's "Vicar of Wakefield," published in 1766; but it was some ten years later that full light was let in on the subject by the famous philanthropist, Howard, who, at the risk of health and life visited nearly every prison in England, and on the Continent, and published his experiences. Long before that, however, judges and legislators must have had an uneasy consciousness that in sentencing a man to imprisonment they were doing no good either to him or to the community; and it was no doubt to some such feeling of helplessness, rather than to any worse motive, that we must attribute on the one hand the reckless employment of the punishment of death, and on the other hand, the successive experiments, almost invariably ill-conceived and disastrous, from the time of Cromwell downwards, in the way of transportation.

Technical Classification of Punishments.—In Commissions of the Peace, and other authoritative definitions of criminal jurisdiction, the subjects of such jurisdiction were, and are, usually distinguished as *treasons*, *felonies*, and *misdemeanors* (sometimes called *breaches of the peace*). Speaking of the period when these names first came into general use, we may say, without great inaccuracy, that the first described offences liable to punishments (1), or (2) coupled with (13); the second, *offences liable to punishments* (3), (4), and (14); the third

all, or nearly all, the rest. But for some centuries past, if it had been worth any one's while to bring the old classification into conformity with the facts, the scale would have been one of five degrees, viz., treasons, felonies *not clergyable*, *præmunire*, felonies *clergyable*, and misdemeanors; the second degree alone corresponding to the above definition of a felony, the third incurring imprisonment for life, together with forfeiture of lands and goods; while the fourth involved some one of the other punishments, or more often several in combination, *plus* the liability to be treated as a non-clergyable felon for a second offence of the same kind. It will readily be understood that the only possible explanation of this strange graduation is not logical, but historical, and we shall thus find ourselves forced, as once or twice before, to trespass considerably on a field which does not properly belong to us.

Clergyable Felony.—By a *clergyable felony* is meant one for which the offender could claim *benefit of clergy*. This was originally granted to those who had received the clerical tensure, as a sort of compromise between the claim set up by ecclesiastics to entire immunity from secular jurisdiction, and the claim of the State to the equal submission of clergy and laity; the arrangement being that in some capital cases, though not all, such persons should be allowed, after the commencement of the proceedings in the regular criminal court, and either before or after, but generally after, conviction, to demand to be remitted to the milder jurisdiction of the spiritual courts. At a later, but still mediæval period, it was settled that the criterion of clerkship should for this purpose be the ability to read; then, in the reign of Henry VII., when this had become a comparatively common accomplishment, the full privilege was again confined

to those actually in orders; but lay "scholars" were allowed to claim it once, on condition of being branded with a hot iron on the left thumb, to prevent their claiming it again. This was their entire punishment, so far as the secular courts were concerned, the theory being that the real punishment was that inflicted by the ecclesiastical courts to which they were remitted. What that amounted to cannot be better described than in the words of Blackstone: "Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial, although he had been previously convicted by his country, or perhaps by his own confession. This trial was held before the bishop in person, or his deputy, and by a jury of twelve clerks; and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then witnesses were to be examined on oath, *but on behalf of the prisoner only* [the irony of this must have been highly relished at a time when no witnesses could be examined on oath on behalf of the prisoner in a regular trial]; and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or [query, if not] put to penance. A learned judge, in the beginning of the last [seventeenth] century, remarks with much indignation the vast complication of perjury and subornation of perjury in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt; the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to *swear himself not guilty*; nor was the good bishop

himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man." It is true that in really bad cases this farce was not allowed, and the prisoner was only delivered to the bishop on the understanding that he was to be sentenced to imprisonment for life, and made incapable of acquiring any personal property, or receiving the profits of his lands, unless pardoned by the king.

An apology is perhaps due to the reader for saying so much about a state of things which passed away soon after the Reformation; but the very meaning of the term *benefit of clergy* could hardly otherwise be made intelligible, since in the eighteenth century the institution, as generally applied, had nothing clerical about it except the name. A statute of Elizabeth enabled the judge to give a year's imprisonment instead of delivering the offender to the bishop; subsequent statutes extended the privilege to women, whether able to read or not, then to men also who were unable to read, while other statutes increased the severity of the substituted punishment; so that, as the law stood when Blackstone's work received the last corrections by its author (1795), lay persons of either sex, guilty for the first time of a clergyable felony, were liable in the discretion of the court to transportation or imprisonment with hard labour for a term not exceeding seven years, to a pecuniary fine, or to not more than three public or private whippings, any of these being with or without the ancient punishment, or precaution, of burning on the hand, and also necessarily forfeited all *their personal property*; while clerks in holy orders, for

the first or any other offence, and also peers and peeresses on a first offence of this kind, were entitled to be discharged without any punishment except the forfeiture of their personal property.

II. PUBLIC WRONGS.

Wrongs affecting the State—Treason.—First among these, in order of gravity, come direct attacks on the national independence or on the internal supremacy of the Government, whether in the latter case the object be to change the form of government by force, or to substitute one set of rulers for another, or to compel the existing rulers to change their measures. These two kinds of crime seem generally to be ranked pretty much on the same level, though a perfectly disinterested patriot would probably consider the first by far the most important. But, rightly or wrongly, Governments have generally been unable to think of anything as more important than their own existence; and as, in the feudal times in which our common law took its mould, the nearest approach to a State was a hierarchy of chiefs and sub-chiefs, and the best substitute for patriotism was the sentiment of personal fidelity from a vassal to his lord, and from all to the king as lord paramount, so it was hard to conceive an attack on the State in any other shape than that of an attack on the person at its head. Hence we shall not be much surprised to find, that the word *treason*, which we just now took the liberty of using to describe collectively the acts which incurred the heaviest kinds of punishment, is one which ought, according to its etymology, to denote the betrayal of confidence, but which does in fact, now that the national idea has long ago displaced, if it has not quite effaced, the traditions of feudalism, convey to the ordinary

reader the notion of an attack on the national government. As a matter of fact the term had comprised, at different periods of our history, an immense number of acts, some only remotely, and some not at all connected with this notion; and even the statute of 25 Edward III., which had remained unaltered, while other treasons were continually being created and abolished generation after generation, described seven distinct acts, of which four certainly have no necessary connection with politics, and did not cover, until stretched to do so by the most harsh and unnatural constructions, some of the deadliest methods by which the internal or external security of the nation might be undermined. The only three political offences described by the statute were (1) compassing, *i.e.*, intending, the king's death, such intention to be evidenced by some open act; (2), levying war against the king within his realm; (3), adhering to the king's enemies in his realm or elsewhere. According to the plain meaning of the words, an attempt, such as that of the Earl of Essex in the reign of Elizabeth, to seize the person of the sovereign in order to constrain him to change his measures or his advisers; a conspiracy which should have done everything to prepare an insurrection short of actually collecting armed men; the assembling of a mob to carry out by violence any general object, as to pull down all inclosures, or all the meeting-houses of some unpopular class; an attempt by a high public officer to use his power for subverting the fundamental laws of the realm, as Lord Strafford did; or such a proceeding as that of Cromwell, when he turned the Parliament out of doors, would not have been treason under the Act; though the first and second cases had for centuries been construed to be *overt acts* of compassing the king's death, the fourth had been punished, with less show of legality, but quite as effect-

ally, by parliamentary attainder; the third had been held, with more decent plausibility, to be a *levying war against the king*, and there can be little doubt that the fifth would somehow have been brought within the penalties of treason had it been unsuccessful. At this particular period there were several statutes in existence, specially aimed at the then extinct Jacobite faction, but not yet repealed, which extended the same severity to certain political acts coming perhaps within the spirit, but not within the letter of the statute of Edward III.

Sedition.—A direct attack on the Government is generally only the concentrated expression of a widespread feeling of disaffection, shared by many persons who are not disposed to take an active part in it; and as rulers are seldom ready to admit, least of all in the cases in which it is most true, that such disaffection represents a genuine sense of wrong in each individual mind, and is the natural reflection of their own misconduct, they will usually look out for some one whom they may punish for exciting bad feeling by false, exaggerated, or violent language, and often, no doubt, will have no difficulty in finding such persons. It must be obvious, however, to every set of rulers not thoroughly frightened or exasperated, that efforts, however malicious, to excite a rebellious spirit among the people are not at all the same thing as acts done in furtherance of an actual design to attack the Government with violence, and that it is, to say the least, bad policy to expend the utmost terrors of the law on these preliminary movements, whereby those once engaged would have no motive to stop short of extremities. Hence, in our own law the punishment for seditious libel, which had for a short time been made a capital felony, while the government of Elizabeth was defending itself almost desperately against the Papists with one

hand and the Puritans with the other, and which had been afterwards punished by the Star Chamber with almost every non-capital punishment that could be devised, had become since the Restoration only an ordinary misdemeanor, punishable with fine and imprisonment. The offence so punished, however, was a tolerably comprehensive one, it having been laid down by Lord Holt, one of the best of the post-Revolution judges, that it was a seditious libel to complain of the mismanagement of the navy, and to hint that some subordinate officials were in the pay of a foreign power.

Obstructing the Government.—Next to direct attacks on the supreme government in the different ways above noticed, we come to a somewhat less dangerous class of offences which aim merely at obstructing the operations of the State-machine, without necessarily intending either to destroy it or to usurp the control of it. There is a broad distinction between the case of a servant endeavouring to make himself master, and that of a servant who is simply impertinent, knavish, or disobedient. Indeed, rulers have been known sometimes to care very little about their efficiency, so long as their supremacy was acknowledged, and to hear with great equanimity of corrupt officials, taxes unpaid and laws disobeyed, though they would resist to the death any attempt to substitute any other government for their own. On the other hand, a strongly bureaucratic government is tempted to invest the pettiest official with something of sovereign majesty, and to treat every infraction of a police regulation as a rebellion. The English Government, in the eighteenth century, was about equally removed, in intention at least, from the laxity of Turkey, and from the precise officialism of which we hear so much in connection with France and *Germany*.

Rioting, &c.—First, as to offences which consist in the disturbance of public tranquillity. Any *two* or more persons fighting in a public place, to the terror of the king's subjects, were guilty of an affray, and as such punishable with fine and imprisonment. The same consequences followed the assembling together of *three* or more persons to do an unlawful act, whether they did it or not, to which the pillory might be added if serious mischief were actually done. But if *twelve* persons were unlawfully assembled to the disturbance of the peace, any magistrate, sheriff, or mayor, might come forward and read a proclamation commanding them to disperse (necessarily rather a long one, since the Act itself, which gave him the authority, had to form part of it, whence the popular phrase *reading the Riot Act*), and if any one interrupted the reading of it, or did not obey it when read, he was guilty as a *rioter* of felony without benefit of clergy (death and forfeiture), while any soldier or civilian who should happen to kill any of the mob while endeavouring to disperse them was held innocent. The inhabitants of the locality were made to realise their interest in the matter by being liable not only to be called out, the able-bodied of them, to assist in restoring order, but collectively to make compensation to the sufferers if any buildings were demolished.

Offences by and against Officials.—Contempt or disobedience towards public officers was dealt with on the whole without unreasonable severity; nor can it be said, on the other hand, that misconduct *by* public officers was treated, as a rule, with excessive indulgence. The superior judges were protected against civil actions in respect of their judgments, and considerable difficulties were thrown in the way of such actions against inferior magistrates; *but both were liable to criminal proceedings for bribery,*

tyranny, or partiality, and there had been an instance, within Blackstone's lifetime, of a lord chancellor (Lord Macclesfield) being fined £30,000 for peculation in his office. Ministers of the Crown were liable to civil as well as criminal proceedings if they used their powers illegally to the oppression of the subject, as one of them found to his cost in the affair of Wilkes and the *North Briton* (1763-1766); and several of the modes of oppression which had been specially in vogue with the favourite ministers of the Stuarts were now subjected to the formidable combination of penalties above described, under the name of *præmunire*. But the form of political immorality which is the special disgrace of the period, namely, the bribery, both direct and indirect, of members of Parliament by the ministers of the Crown out of public money, has left no trace whatever of its presence in the criminal law. The acceptance of such a bribe by a member of either House might no doubt have been punished as a breach of privilege by that House, or by the Lords on impeachment by the Commons: "*sed quis custodiet ipsos custodes?*" There is no record of its ever having been done, and it was not to be expected. As for bribery at parliamentary elections, the sincerity of the Legislature in professing to suppress it may be measured by the fact that, while the person bribed was liable to a money penalty, the briber was subject to no other penalty than to be unseated at that particular election. In fact, though nominally an offence against the State, bribery was in reality an essential part of the machinery of our constitution as then understood, as the increasing stringency of recent legislation against it is an essential part of our present more popular constitution. The whole subject may therefore be relegated to the domain of constitutional law.

Offences against Public Justice.—Closely connected with contempts of lawful authority are the various offences which consist in obstructing or preventing the course of public justice. The fining of witnesses and jurymen for refusal or neglect to attend, and the offence of rescuing a prisoner, or resisting legal process, need no special mention; but it may be interesting to note, that not till after the appearance of our author's first edition, was the *peine forte et dure* abolished, though it had long been practically obsolete. This consisted in either starving or pressing to death an accused person who refused to answer the charge, it being the strange notion of our mediæval ancestors, that until such a person pleaded *guilty* or *not guilty*, he could not justly be tried and convicted, though he might justly be tortured till he either died or pleaded. There had been instances of men actually enduring a lingering death in this way, in order to save for their children the property which would have been forfeited on their conviction. The chief offence, however, which comes under this head is *perjury*. It is unnecessary to enlarge upon the importance of wise legislation on this point. If the ultimate benefit of all the machinery of the constitution was, as somebody said, "to get twelve honest men into a box" to give a verdict, without fear or partiality, on the evidence submitted to them, it is obvious that no pains could be too great in order to secure the abundance and the purity of such evidence. To what an extent the English law sacrificed abundance for the sake of securing, as they fancied, a higher degree of purity, we shall have to examine further on; we are now only concerned with the *penal* measures taken to protect the purity of testimony. The peculiarity of the law on this subject was that no falsehood was punishable unless given in a *court of law*, and under the sanction of an oath,—except,

indeed, that the House of Commons, which, for some reason or other, had no power to administer an oath, was in the habit of treating falsehoods uttered before it as *contempts*, and punishing them by fine or by imprisonment till the end of the session. It has been remarked that the name was an odd one, since the usual motive for falsehood is *fear*, which is the very opposite of contempt; but it is more important to observe the difference in severity of punishment where there was no corresponding difference, or in some cases a difference the wrong way, in the mischief of the offence. It was further necessary to constitute perjury that there should be a positive false statement in a point *material to the issue*. Actual perjury ranked as a misdemeanor only, but was punishable with what was perhaps sufficient severity for most ordinary cases, either by fine, or by seven years' imprisonment or transportation; or, under an old statute, seldom if ever resorted to, by having both ears nailed to the pillory; besides which the offender was for ever incapable of bearing testimony.

Offences against Religion.—It is a consequence of the very peculiar course of English history that at this point, and not further on, we are called upon to deal with offences relating to religion. In a good modern code the few prohibitions of this kind would be ranked among the laws for the protection of decency and morality, under the general head of *offences affecting the community at large*, and would be directed against disturbances of religious worship, against wilful insults to the religious feelings of other people, against the selfish or oppressive use of priestly influence, and against religious rites of an obviously revolting or immoral character. But in England, throughout the whole national history, a line had *been drawn between the so-called secular and the so-called*

spiritual power; the latter being understood to mean, not the power of the spirit, of moral influence as opposed to physical force, but the power of a certain class of officers, distinguished from other officers of the State (1), by the fact that they dealt with particular departments of human conduct distinguished for no very obvious reason as spiritual; (2), by the fact that they were expected to use moral influence *in addition* to the physical force put at their disposal; and (3), down to the sixteenth century, by the fact that they derived their authority partly from the king and partly from a foreign potentate, the common head of Christendom. The confusion thus produced between the domain of positive law and that of the private conscience was thickened rather than diminished by the Reformation; for the legal powers classed as spiritual continued to exist, for the most part, though wielded by officers deriving their authority exclusively from the head of the nation, while in addition there were a class of men to be dealt with who still persisted in looking to the Pope as their ruler in all the matters which *he* classed as spiritual, a much larger number than those recognised as such by English law, and who consequently required, or were thought to require, a special set of penal laws for their repression.

The laws affecting religion may therefore be classified as follows :—

(1). *Laws for the repression of Papists*, considered as a body of men rendering obedience to a foreign potentate, to an extent supposed to be incompatible with their duties as Englishmen. When Blackstone's work was first published, all Papists, without distinction, were reckoned in this category, unless those could be considered entitled to the name who were willing, not only to take the oath of allegiance, but also to acknowledge the supremacy of the king in ecclesiastical matters, to sign a declaration

against the doctrine of transubstantiation, and to attend the worship of the Church of England. All persons unwilling to comply with these conditions were incapable of acquiring any real property by inheritance, or in any other way, were forbidden to keep arms in their houses, or to own a horse worth more than £5, and were liable to perpetual imprisonment if they ventured to keep or to teach in any school, and to a year's imprisonment and a considerable fine for hearing or saying mass. After one conviction for non-attendance at the Church of England service, such person became a "Popish recusant," and as such was further disqualified from bringing any action in a court of law, was forbidden to come within ten miles of London, or to travel five miles from home without license, and might at any time be called upon to abjure and renounce the realm, on pain of suffering death as felons without benefit of clergy. Popish priests were liable to perpetual imprisonment for exercising any part of their functions, and to the penalties of high treason for coming over from abroad and staying three days without taking the oaths. Protestants becoming *reconciled*, or *reconciling* others to the Church of Rome were punishable as for high treason.

These atrocious laws had already become so repugnant to the general tone of feeling among the governing classes as to be very seldom put in force; and Blackstone lived long enough to insert in his later editions an Act passed in 1778, relieving from most of the penalties and disabilities all who would take the oath of allegiance, abjure the Pretender, renounce the civil power of the Pope, and express their abhorrence of the doctrine that faith was not to be kept with heretics, and that princes excommunicated by the Pope might lawfully be deposed and murdered.

(2.) *Laws affecting those Protestant dissenters* who accepted in the main the theological dogmas of the Established Church, but objected to certain ceremonies, or to the system of Church government. Such dissent was no longer, properly speaking, an offence, but only a ground for certain civil disabilities, intended to be precautionary rather than penal, and as such will be noticed at a later stage.

(3.) *Laws for the repression of religious opinions*, unconnected either with Popery or with politics, which were thought to be culpably and dangerously heterodox. To ascertain exactly where these should be placed in our code would involve an answer to the question, what sort of danger did the authors and maintainers of these penal statutes suppose themselves to be guarding against?—a question more easily asked than answered. If the object was merely to prevent quiet people from being alarmed, irritated, or distracted by attacks upon the popular faith, or to protect the general interests of morality, supposed to be bound up with that faith, their proper place would be farther on, among other public nuisances. But on the whole, looking at the matter from the point of view of those times, according to which the Scriptures were a part of the law of the land, and the authoritative inculcation of revealed religion a principal function of government, we shall not be far wrong in classing these offences also under the head of *obstructions to the operations of Government*. The principal statute on this subject was the 9 & 10 Wm. III. c. 32, which enacted that “if any person educated in, or having made profession of the Christian religion shall, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he shall, upon the first offence, be rendered incapable to hold any

office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail;" and the same penalties were denounced against any one who should "by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or maintain that there were more Gods than one." This was, of 'course, in addition to the political disabilities common to them with all other dissenters, to the fine for non-attendance at church, to excommunication by the ecclesiastical courts for heresy, and to the common-law punishment for "blasphemous libel."

Coinage Offences.—It is the fault of the law itself, not of our arrangement of it, that we come next to so very different an offence as that of counterfeiting the coin of the realm. Here, also, there may be a doubt as to the class to which it properly belongs; the essential mischief being the confusion introduced into all business transactions between man and man, though this is done by means of an interference with a convenient medium of circulation specially provided by the Government, stamped with the image of the sovereign, and the use of which by the subject is not entirely a matter of free choice. But, whatever its place in a scientific classification, it was at this period so far assimilated to political offences as to be called by the name, and subjected to all but the mutilation part of the punishment for high treason. Some minor offences of this class were punished in various ways not necessary to specify, some as felonies, and some as misdemeanors.

Wrongs affecting the Community at large—Weights and Measures.—Offences relating to weights and measures may look at first sight as if they ought to *rank with coinage offences*; but the difference is that here

only the standard is fixed, not the articles themselves made, by Government agency, which causes them to rank merely as offences affecting the community at large—if even that; for the tendency at this time seems to have been to consider them as private wrongs, criminal indeed, but such as could be left to be prosecuted, like other kinds of cheating, by the individuals actually injured by them, rather than as offences against the public, to be guarded against by Government supervision and punished by Government prosecution. Such supervision had existed, and had been rigorously enforced in earlier times, and has been to some extent reintroduced in our own day; but the Government of the Georges adhered, on the whole, to the rule of *laissez-faire*, not on any philosophical principle, but simply because the ruling oligarchy were neither sufficiently despotic on the one hand, nor sufficiently trusted by the people on the other, to carry out any efficient system of inspection; nor indeed, to tell the truth, were they sufficiently interested in the welfare of the masses to give themselves so much trouble. The adulteration of food, and many similar matters, were left to the same inefficient remedy. When they did venture to risk odium and opposition by meddling and inquisitorial officialism, it was for the sake of the revenue and for the prevention of smuggling. Though it had been the law, ever since Magna Charta, if not earlier, that there should be one standard of weights and measures throughout the kingdom, it seems that custom had been too strong for the law, and each part of the country and each trade had, to a great extent, retained a peculiar standard, and sometimes a peculiar nomenclature of its own. But if too little, according to the prevalent notions of the present day, was done in some ways for the regulation of commerce, too much was done in other

ways. Among the offences enumerated by Blackstone we find *forestalling*, *i.e.*, buying goods on their way to market, which was supposed to be taking an unfair advantage of those who came to purchase there in the regular way; *regrating*, *i.e.*, buying provisions in any market and selling them again in the same market, or within four miles thereof; *engrossing*, *i.e.*, buying up large quantities of provisions with intent to monopolise the trade, and so sell them at a starvation price; combinations among victuallers or artisans to raise the price of provisions or other commodities; and exercising a trade in any town without having previously served as an apprentice for seven years.

Public Nuisances, Idleness, &c.—In the remaining offences affecting the community at large, *viz.*, those affecting the general health, comfort, decency, and morality, there is little to detain us. Most of them were included in the elastic term *public nuisance*, under which name the judges from time to time declared anything to be punishable according to the Common Law which appeared to be objectionable, having regard to the average habits and sentiments of their own generation. Among statutory prohibitions of this class the most noticeable are those directed against idleness in various forms. Against simple idleness on the part of wealthy people, it is needless to say that there were no prohibitions; but even in their case Parliament did go so far as to prohibit (not apparently with very much success) betting and high play in some shapes, though in other shapes, and to a moderate amount, a bet was, as we have seen (p. 53), actually recoverable in a court of law; and licensed public lotteries were a regular source of revenue to the State. But of the morals of the lower classes much better care was taken. *The game laws*, making it an offence in any one but a

considerable landowner to kill, buy, or sell any of the more valuable kinds of wild creatures, are placed by Blackstone, with a little gentle irony, among laws for the prevention of idleness, as though that were the only ground on which they could possibly be defended. Another statute is mentioned by him in a way which seems to imply that it was not obsolete, which prohibits to all but gentlemen the games of tennis, tables (?), cards, dice, bowls, and also the following *unlawful diversions*:—"Logetting in the fields, slide-thrift or shove-groat, cloyish cayles, half-bowl, and coyting," unless in time of Christmas. Moreover, idleness pure and simple might expose a person to rather serious consequences. Simple refusal to work for the usual wages was classed with other acts of a more positive character as constituting an *idle and disorderly person*, punishable as such with one month's imprisonment. Persons "wandering abroad, and lodging in alehouses, outhouses, or in the open air, without giving a good account of themselves," were put in the next class, that of *rogues and vagabonds*, punishable with whipping and six months' imprisonment,—a class which contains, like the former, a most motley set of offenders, from the harmless street musician to the villain who deserts his wife and family. A second offence of "lodging in the open air," &c., constituted an *incorrigible rogue*, punishable with whipping and two years' imprisonment. These laws were all connected with the law of settlement, under which every parish was chargeable with the maintenance of its own paupers, and of which it was the chief object, as far as possible, to prevent any one of the class likely to become chargeable from leaving his native parish; and, if he did go elsewhere, and become destitute, to send him back with as little delay as possible.

III. PRIVATE WRONGS.

Wrongs affecting Life.—Probably there never was a legislator, not opposed altogether on principle to capital punishment, who did not include these among the offences for which it should be inflicted; least of all was it likely to be spared in England, where it was lavished on acts far less alarming to the community. The primary rule of the English law on this subject was just what we should expect—viz., that killing with intent to kill, and without any special justifying or extenuating circumstances, was visited, under the name of *murder*, with the punishment of the highest kind of felony, viz., death and forfeiture of personal property. So, too, the rules as to the cases in which homicide would be justifiable were, in the main, such as we might take for granted, namely—

- (1.) Necessary self-defence;
- (2.) Legal duty, as where a criminal is executed according to his sentence;
- (3.) Accident;
- (4.) Want of understanding, whether from madness, in any of its forms, or from infancy, but not if due to intoxication.

What is so specially reasonable as to be worth noticing, considering the early period at which the law had been so settled, is that the plea of self-defence was not allowed to cover revenge, nor even the pride which disdains retreat. The grossest provocation was only an extenuation, not an excuse, and it was a duty to run away from an assailant rather than to slay him. What is so specially *unreasonable* as to arrest attention is, that accident was no defence if the slayer happened to be engaged in doing an illegal act quite unconnected with any homicidal intention. Thus, suppose that A, shooting at a fowl,

killed B, who, unknown to him, was just behind the hedge. Here, if A's intent was to steal the fowl, which would be felony, the accidental homicide was murder, punishable as above-mentioned; if he intended to kill it merely as a piece of mischief (that being either a civil trespass or a misdemeanor, but certainly not a felony), it amounted to the lesser offence called *manslaughter*,—a clergyable felony; if the fowl was A's own property, he had committed no offence at all, though his state of mind in reference to B was equally innocent in all three cases.

The only circumstance which would reduce homicide from murder to manslaughter, where there was an actual intent to kill, was the existence of strong and recent provocation, not used as a pretext for gratifying hatred, but actually depriving the slayer of his usual self-control. All the other cases mentioned in the books are in reality mere varieties of the case above mentioned, of killing by accident when intending to do some other unlawful but not felonious act.

A circumstance which might have been expected to have this mitigating effect, but had not, was that of the party killing having *consented* to his own death or to take the risk of it. In one shape, that of an agreement to fight a duel, this was the commonest of all cases at this period. Law is generally found either to represent, or to lag somewhat behind, the average sentiments of the governing classes; but in this instance ours went right in the teeth of that sort of public opinion with an audacity which is really astonishing. Not only it had been laid down in the text-books of such sages of the law as Sir Edward Coke and Sir Matthew Hale, that to kill a man in a duel was murder; but so lately as the reign of George II. a gentleman had actually been convicted in grim earnest, and sentenced to the gallows for it,—a sentence with

which the king refused to interfere, and the execution of which was only prevented by the suicide of the offender. It is true that this was the only instance, and that it was in some respects a specially bad case, the duel having been almost forced upon the deceased by the victor, and having been conducted without witnesses or any of the usual securities for fair play, though the dying statement of the victim seemed to acquit his antagonist of any actual unfairness. But how such a law was maintained at all at a time when almost every gentleman would have felt himself disgraced by the imputation that he had refused a challenge, is a fact which it is very difficult to explain. To the ordinary mind the words *homicide* and *murder*, like all other terms descriptive of wrongful injuries, inevitably present the idea of at least two persons concerned,—the aggressor and his victim. But such was not the view of the English lawyer. Not content with saying that *suicide* was in some sense an injury to the survivors, that the example might have a demoralising effect, and claiming on that ground a right to discourage it by threats of such posthumous ignominy as the State might be capable of inflicting, they would have it that it was murder, and nothing else, by the very terms of the definition. The suicide was *felo de se*; having committed a felony (not clergyable) upon himself, his personal property was forfeited to the Crown; he could not well be “hanged by the neck till he was dead,” but this deficiency was, as far as possible, made up by additional ignominy inflicted on his corpse. Whilst the body of an ordinary felon was usually dissected and then buried within the prison, only in exceptional cases hung in chains, that of a suicide was buried in a highway with a stake driven through it. A further logical consequence of this view was, that any person abetting the suicide of another was guilty of

murder; so that if two persons agreed to commit suicide together, and only one carried out his intention, the other might be hung as an accomplice.

So much for the punishment of homicide. Of civil remedies for injuries affecting life, there was nothing to be said at this period. The age was much too civilised to admit of a murder being treated as a private affair between the murderer and the relatives of his victim, and being settled by the payment of a *weregild*, but not civilised enough to trouble itself about consoling the survivors *in addition* to punishing the crime. The family of the murdered man might have lost in him their chief source of subsistence, and the murderer might be a millionaire; the former would in that case be severely punished if they took a bribe for hushing up the matter; while if they prosecuted to conviction they would barely be repaid the expenses of the prosecution, and would see every penny of the latter's property go into the public treasury. Their case was no better if the death of their protector was due to some fault or neglect short of criminality. If he had been upset in a stage-coach and broken his leg, he could have recovered compensation from the proprietor in a civil action for the pain itself, for the medical expenses, and for the loss of profits owing to his absence from business; but if he broke his neck instead, his family had no remedy whatever, for "a personal action dies with the person."

Wrongs affecting the Body, but not the Life.

—A person may be wronged with respect to his body (1) by its being maimed or permanently disfigured; (2) by the infliction of bodily pain; (3) by being prevented from making free use of his limbs. There is yet a fourth class of wrongs affecting the body, namely, those prompted by illicit sexual passion, the treatment of which does not *come within the scope* of the present elementary treatise.

Wrongs of the first class amounted, generally speaking, to felony without benefit of clergy; the grotesque narrowness of the Common Law, which refused to recognise an injury as anything more than ordinary assault and battery, unless it affected some member which would be useful in fight, had been cleared away by a statute known as the Coventry Act, as soon as a member of Parliament, in the reign of Charles II., happened to get his nose slit by hired ruffians. Wrongs of the second class were merely misdemeanors, punishable with discretionary fine and imprisonment; and the injured party was allowed to bring a civil action for damages either instead of, or in addition to, the criminal proceedings. The like double remedy was available in the case of illegal restraint and confinement, technically called *false imprisonment*; or indeed a treble remedy, for the person illegally confined could also at once obtain a peremptory order for his production in Court, leading, of course, to his release, in the shape of a *writ of habeas corpus*.

Wrongs Affecting the Mind.—This heading, which in a truly refined system of jurisprudence would be one of the most important, will not be found at all in Blackstone's Commentaries. Had he thought proper to insert it for the sake of symmetry, he would have had very little to put under it. English judges and legislators seem habitually to have considered that they had no faculties for considering injuries which did not consist either in physical pain or privation, or in the loss of money or money's worth; though, when such material injury was made out, they had sometimes no objection to consider the mental injury as matter of aggravation. A blow as light as a feather, a pull at your sleeve, or even an approach for such a purpose, was actionable or punishable as an assault; and if it were shown from surrounding cir-

cumstances to have been intended as a deadly insult, proportionate damages might be awarded. An insult by mere words or gestures might, under certain circumstances, be treated as having a tendency to provoke a breach of the peace, and thus as being a species of public offence; but in no other way could a court of law take notice of it. And we shall see that in dealing with attacks on reputation the element of mental pain might constitute an independent ground of action where the imputation was embodied in a permanent form, but not otherwise. It is clear that this department ought, logically, to include not merely the causing of mental pain, but the obstruction or perversion of a person's mental activity by *deceit*, just as we should include in *injuries affecting the body* the blinding or paralysing a man by a painless operation. But, in fact, we find that deceit was but barely recognised in our law, except as a means of wrongfully obtaining property. A civil action would lie for a misrepresentation which could be shown to have caused damage of any kind capable of being estimated in money; and, *perhaps*, a person might have been punished at Common Law (with fine, imprisonment, and pillory) for a forgery or other deceitful practice, without showing that it was committed for the sake of gain; but all the numerous statutes on the subject of forgery and cheating treat them as offences affecting property.

Wrongs Affecting Reputation.—These were principally of two kinds—(1), oral, or evanescent; and, (2), written or otherwise permanent imputations. To the first, called *slunder*, no penal consequences were attached, and a civil action could only be brought for words imputing a criminal offence, conduct unfitting a person for his trade or profession, or a loathsome disease, or for words which could be shown to have produced some special

damage capable of being estimated in money. In the expressive language of one of Blackstone's editors, "the words scoundrel, rascal, villain, knave, miscreant, liar, fool, and such like general terms of scurrility, may be used with impunity, and are part of the rights and privileges of the vulgar." The second, called *libel*, might be treated, according to circumstances, as either a criminal offence or a civil injury. In either case the essence of the wrong was that by words written or printed, or pictures, or other permanent signs addressed to the public, the complainant had been held up to hatred, contempt, or ridicule; the chief difference between the two was, that in the civil action, where the question was whether the plaintiff was entitled to compensation, the defendant was allowed to justify himself by proving the truth of the accusation; whereas on a criminal indictment, the theoretical ground of the charge being the tendency of such imputations to provoke a breach of the peace, or, at least, to disturb the harmony of society, the offence was the same in point of law whether the statement published were true or false.

Wrongs Affecting Property by Misappropriation.—The unlawful transfer to some other person of the advantages derivable from a proprietary right, against the will of the person invested with the right, ought of course to be considered and provided against with regard to every kind of right which is capable of being transferred. But the present writer is not acquainted with any system of law in which all wrongs of this kind are comprised under any one general term, or dealt with by any general enactment. Least of all was such a notion likely to occur to the successive framers of our English Common Law. Our largest technical term, and that which corresponded most nearly to the popular term

"theft," was *larceny*, which covered, as we shall see, but a very small part of the whole field. To begin with, the misappropriation of real property was not only not larceny, but was not dealt with under any name as a distinct kind of wrong. In so far as *real* means *immoveable* property, it is obvious that any criminal misappropriation of its advantages must take the form of force or fraud directed against the body or mind of the lawful possessor, or else of the abstraction of some moveable thing which gives the power of obtaining possession, as the key of a house or gate, or the title-deeds of an estate. Personal violence and cheating were of course crimes already, and there was no special reason for giving them new names and exceptional treatment when employed for this particular purpose; the additional wrong involved in the dispossession could be redressed by simple reinstatement. An intruder merely entering on the land was liable to an ordinary civil action of trespass, and might also be turned out without unnecessary violence, being guilty of assault and battery if he resisted. Any interference with the tenants of the rightful owner gave rise to a civil action of *ejectment* (*de ejectione firmæ*), which had become, in fact, the usual method of trying a disputed title to real property. The abstraction of a *moveable* as a means of obtaining possession, might, one would think, have been dealt with adequately and naturally as a larceny of that chattel, its use in connection with the land being of course taken into account in estimating its value. But this did not at all satisfy the subtlety of the ancient judges. To their acute olfactory perceptions the title-deeds *savoured of the realty*, and as such could not be *stolen*, though twenty witnesses might testify to their physical abstraction. The injured owner might bring a civil action for trespass, but nothing more.

By a similar perversity, trees, crops, minerals, and artificial fixtures were held not to be the subjects of larceny at Common Law; that is to say, if the wrong-doer severed them and carried them away by one and the same act, they had never been personal property in the possession of the landowner, and therefore had not been stolen; though if, after severing them, he had left them lying on the ground and afterwards returned to take them away, it would have been a clear case of larceny. To this state of things a partial remedy had of late years been applied in a manner thoroughly characteristic; the rule had been left, but it had been eaten into by successive exceptions created by separate statutes, until all shrubs and fruit trees, most of the important vegetable crops, nearly every species of English timber tree, one particular kind of mineral, and certain special kinds of fixtures, were adequately protected so far as depended on severity of punishment; while other similar articles which had never happened to attract attention, might still be severed and carried away with no worse consequence than an action of trespass.

Other kinds of misappropriation escaped from the grasp of the Criminal Law, owing to that part of the legal definition of larceny which required that moveable property should be taken *out of the possession* of the owner. Hence, on the one hand, rights which did not imply direct contact with any material thing, and rights which were not present but future, were not the subjects of larceny; and by an application of the same sort of reasoning which we have already noticed as to real property, documents of all kinds which were only valuable as evidence of title to such rights, such as cheques and bank-notes, shared in the same disqualification. And hence, on the other hand, actual tangible moveables were not

held to be stolen if they had come lawfully into the possession of the wrong-doer (*e.g.*, valuables intrusted to the keeping of a servant, or received by a cashier on account of his employer), and had then been unlawfully retained for his own benefit. These huge gaps had become partially filled up by the time of George III., partly by dint of legal fictions, such as the fiction that the possession of the servant was *constructively* the possession of the master, and partly by positive statutes; but the *embezzlement* of money received by a clerk or servant on account of his master, was not made punishable as larceny till 1799; and similar conduct on the part of bankers, merchants, and others, who were neither clerks nor servants, was not provided against till much later; documents of title also remained unprotected. It was further necessary that the thing should be taken and carried away without the consent of the owner. If his consent was obtained by deception, it might be forgery or cheating, but it would not be larceny.

Supposing now that a moveable, legally capable of being stolen, has been taken out of the possession of the owner without his consent, we still want to know something more before we can say whether it is larceny or not. In all tolerably civilised systems, it is the intent which constitutes the crime; but all the light which the old authorities were able to throw upon this point amounted simply to an identical proposition, viz., that to constitute a larceny there must be a *felonious intent*.

Simple Larceny—*i.e.*, larceny unaccompanied by any special aggravation—was punished as a clergyable felony, with imprisonment not exceeding two years, or transportation not exceeding seven years, besides burning in the hand or whipping, and forfeiture of goods, but with death for the second offence. Simple larceny of horses

or cattle, and of some other things specially protected, was punished capitally even on the first offence. The distinction between *grand* larceny, where the property stolen was worth more, and *petit* larceny, where it was worth less than twelve pence, had once been of tremendous importance, while the former was capital and the latter punishable only with whipping and imprisonment; but was now comparatively immaterial, except when the larceny was *compound*.

Compound larceny is larceny aggravated in respect of either the *mode*, the *time*, or the *place*. It was aggravated as to the mode if the thing was taken actually from the person of the possessor, still more if taken by violence or by threats (robbery); it was aggravated as to the time if taken by night; and as to the place if taken on a highway (highway robbery), or from a dwelling-house (housebreaking by day, burglary by night). With regard to these compound larcenies, it is sufficient to state generally that they were all capital if the value exceeded twelve pence, and some of them irrespective of the value.

Receivers of stolen goods could either be treated as accomplices of the thief, and visited, *after his conviction*, with the same punishment, or convicted independently of a distinct misdemeanor, punishable with fine or imprisonment.

The misappropriation of property by deception was, as already stated, not larceny; but it was punishable, under the general description of *obtaining valuables by false pretences*, with imprisonment, fine, pillory, transportation, or whipping; and if it was accomplished, or even attempted to be accomplished by means of some written forgery, it could hardly fail of being a capital offence under some one of the numerous statutes on the subject.

If a case of misappropriation was neither larceny nor any offence punishable as larceny, nor forgery, nor cheating, the only remedy was by civil action. Such action might be brought in several different forms; but in none of them, strange to say, could restitution of the thing itself be enforced, except in the peculiar case in which the taking itself was merely a method of enforcing some other legal claim which the owner disputed, and was willing to have regularly tried (*replevin*). In all other cases the wrong-doer might keep the thing, if he chose, only paying pecuniary compensation.

Wrongs affecting Property otherwise than by Misappropriation.—All injuries affecting property where there is no actual misappropriation—in other words, where the thing remains in the owner's possession—will be found to answer to one or other of the following descriptions:—

(1.) A derives enjoyment from B's thing, leaving it in B's possession, and not necessarily injuring it, but preventing him from having the *exclusive* enjoyment to which, as owner, he is entitled. Instances: A common trespasser on enclosed land, or a man who goes and reads a book in his neighbour's library without taking it away.

(2.) A deals in such a way with something of his own, as to prevent B from deriving that full benefit from *his* thing which constituted his property in it, though without directly affecting that thing. This is what is called *a nuisance to property*.

(3.) A makes use of B's thing in such a way as to diminish its value to B; as by wearing out his clothes, or taking a hard day's hunting with his horse; or, to take an illustration from a very different department, imitating his inventions or pirating his literary ideas.

(4.) A inflicts actual injury on B's thing, without

deriving any benefit from it for himself; the ordinary cases of what we call pure mischief.

(5.) A, a partial owner in possession, uses a thing, generally, of course, an immoveable, in such a way as to diminish its value to B, who also had an interest in it, contemporary or subsequent. This in legal language would be called *waste*.

Of these kinds of wrongs, the 1st, 2d, 3d, and 5th gave rise to civil proceedings only; damages might be recovered in an action at Common Law for trespass in the popular sense (which is one of the legal senses) of the word, and also under the same name for the 3d of the kinds of wrong above described. For *nuisance* and *waste* the injured person might also claim damages; but as to these, being *continuing* in their nature, his most effectual remedy (if he could afford it) was to go into the Court of Chancery, and get an order, called an injunction, at once prohibiting them for the future, and awarding compensation for the past. This latter remedy was also applicable to infringements of copyright or patent-right.

The 4th species of wrong might be civil or criminal according to circumstances. It seems impossible to lay down any general rule on the subject, beyond saying that every act of mischief to another person's property was a civil *trespass*, unless it had been made a crime by some particular statute. A number of mischievous actions—too many to enumerate, and too miscellaneous to be brought under any common principle—had at various times and by various statutes been made felony (clergyable or otherwise), leaving unpunished plenty more of the same kind, and equally mischievous. The gravest of all, and the only one dignified with a special name, was *arson*, or mischief by fire, which was a capital offence in most forms, especially as applied to houses.

Wrongs by Breach of Contract and Quasi-Contract.—For the reason already given—namely, the scantiness of this part of the law, and its comparative excellence so far as it went—these wrongs and their remedies may be disposed of very briefly. The broad general rule was, that a breach of contract could only give rise to an action for damages; that the defaulter could neither, on the one hand, be compelled actually to fulfil his contract, nor, on the other, be punished as a criminal. But in each of its branches this rule admitted of some few exceptions. A plaintiff who was rich enough to venture into the Court of Chancery could sometimes obtain there, though not in the ordinary courts, a decree for *specific performance*, if he could satisfy the Chancellor that pecuniary compensation would not meet the justice of the case, and that there was no inherent impossibility or absurdity in compelling such performance. On the other hand, a workman or servant breaking his contract with his master was liable to be sent to prison by a magistrate for a month, or in some cases three months, with hard labour. This perhaps is scarcely an exception to the rule, since under the old statutes relating to labourers the so-called contract was itself the result, directly or indirectly, of legal compulsion.

In one sense nearly all breaches of contract may be said to have had criminal consequences attached to them, since they would necessarily be reduced, sooner or later, to the form of a pecuniary debt; and all debtors other than traders were liable, as we have seen, to imprisonment for non-payment.

CHAPTER IV.

PROCEDURE.

I. COMMON LAW CRIMINAL PROCEDURE.

Varieties of System.—There was not at the time we are speaking of, and never has been before or since, any one system which we could speak of as *the* English Law of Procedure. Passing over courts and systems peculiar to certain localities, there were at least four distinct systems locally universal, the differences between which were hardly even pretended to have any connection with the nature of the business or the interests of justice, and were in fact manifestly due to the different historical origin of the courts administering them. These systems were—(1) the Common Law system, administered by the three superior courts sitting at Westminster and the various inferior courts dependent on them; (2) the Equity system, administered by the Court of Chancery in London; (3) the system of the Canon Law, administered by the Ecclesiastical Courts (episcopal and archiepiscopal), which had at this time a very extensive jurisdiction, both criminal and civil; (4) the system of modernised Roman Law, generally called Civil Law, in another of the numerous senses of that terribly overworked little word, administered by the Admiralty Courts in maritime cases. We might perhaps reckon them as five, since the procedure of the Common Law Courts was very

different in criminal and in civil (*i.e.*, non-criminal) cases, though administered by the same judges; but here there was a real difference in the objects supposed to be aimed at, by which the difference of method might to some extent be accounted for.

Common Characteristics.—Certain characteristics, however, may be noticed as common to all these systems. Thus—

(1.) The judges of all the superior courts were men chosen from among the leading barristers, whose life consequently had been spent in the practice of advocacy, generally, though not quite universally, under the same system of procedure which they were afterwards called upon to administer. They had, therefore, together with the advantage of ample familiarity with the details of that system, the disadvantage of almost inevitable bias in favour of the arrangements most convenient and lucrative to the members of their own profession, as opposed to those which might be most beneficial to the public. Though their appointments were, more often than not, the reward of political partisanship, yet, once appointed, considerable precautions were taken to shield them from that kind of temptation. On the one hand, they were excluded, at least by custom, from the House of Commons; on the other hand, they were not removable from their seats by any less force than the concurrence of King, Lords, and Commons. From the Government of the day they had nothing to fear, but something to hope. From public opinion they had nothing of a tangible sort either to fear or to hope, and direct bribery had not for some time past been imputed to any of them; but they were not so well guarded from temptation in another quarter. They were paid, not by fixed salaries, but by the fees exacted from the litigating parties at each stage of their proceedings, so that they

had a direct pecuniary interest in the multiplication of those stages, and also in the encouragement of some kinds of litigation and the discouragement of other kinds.

(2.) In all except the very lowest courts it was practically impossible for the parties concerned to state their case without the intervention of at least two hired agents, an attorney and a barrister. It may be added, that these also were paid according to the number of formal steps taken and the length of the documents framed by them.

(3.) In all non-criminal proceedings the costs were paid in the first instance by the party on whose behalf they were incurred, and ultimately by the unsuccessful party, if solvent; no part of the expense being borne by the State.

(4.) Under none of these systems, except that part of the criminal procedure which dealt with the pettiest cases in a summary fashion, were the earlier steps of the proceedings superintended by the persons who were to pronounce the ultimate decision.

(5.) All these systems alike, with partial exceptions in respect of the ecclesiastical and the criminal procedures, were so thoroughly centralised that justice was literally inaccessible without a resort, in person or by agent, to the metropolis. Even of suits said to be tried at the assizes, during the periodical flying visits of the metropolitan luminaries, both the beginning and the end were transacted at Westminster; and *equity* was not to be had out of London in any shape. The few local courts which existed were either mere shadowy remains of the ancient Saxon system long ago destroyed by the King's Courts, or tribunals thoroughly anomalous and exceptional, which had never formed part of any system, such as the Court of The Stannaries in Cornwall, and the Palatine Courts of Chester, Durham, and Lancaster.

(6.) Certain remarkable rules of *evidence* were common

to all these systems without exception. No statements could be received as materials for a judicial decision without the sanction of an oath; the regular ceremony was by kissing the New Testament, but it had recently been determined, by a great stretch of liberality, that a heathen who believed in a Supreme Being and in a future state of rewards and punishments, might be sworn according to the forms of his own religion. It followed from this that the evidence of professed atheists, of whom there were not a few in the middle of the eighteenth century, could not be received at all; and the same was the fate of the Christian sect called Quakers, who, accepting the express prohibition of the Founder of Christianity in its plain and literal sense, considered it sinful to take any oath whatever. Thus it was equally safe to rob an atheist or a Quaker when no one else was present, or to murder a Christian in the presence of an atheist or a Quaker.

The evidence of a husband or wife could not be received for or against the other; no person could be compelled to answer a question in the witness-box when by so doing he might have to acknowledge himself guilty of a crime; nor even to allow the inspection of any documents in his possession which might have a similar effect; no attorney or barrister could be compelled as a witness to disclose what had passed between himself and his client.

Other rules of exclusion confined to particular courts will be noticed further on.

(7.) Under all systems alike the interests of truth and justice were liable to be sacrificed at any moment to the claims of the revenue. It was a favourite, though most oppressive, financial resource to levy *taxes on legal instruments of all kinds* by means of stamps, which were in effect Government receipts for the sums so levied, and which were required to be affixed to such instruments

as the condition of their validity; and in order more effectually to secure the payment of the tax, the courts were absolutely prohibited from looking at any document, even for a collateral purpose, unless it not only bore the proper stamp when produced in court, but had been stamped at the proper time.

Quarter-Sessions.—The system of criminal procedure was on the whole the simplest, and is, therefore, the best to begin with. Here the regular tribunal consisted of a *judge*, trained and paid as above stated, and of twelve men without any legal training, taken by a mixture of chance and selection from the middle ranks of the community, a different set for each occasion, called the *Jury*. The division of labour between them will be explained presently. But a very considerable proportion of cases, chiefly small felonies and misdemeanors, usually came before a local tribunal called the General or Quarter Sessions, sitting four times a year for a few days each time, in which for the judge or judges was substituted any number of *justices of the peace* who chose to attend, not being less than two, the presidential duties being discharged by one of them elected by the others to be their chairman, and the sentence being that of the majority; the functions of the jury being the same as in the former case. A *justice of the peace* was then, as now, a magistrate appointed and removable by the Crown; it was necessary that he should own a certain amount of property in land (unless he had certain special qualifications implying a rather high social position), but not at all necessary that he should have received any legal training; he received no pay except in the shape of power, dignity, and patronage, in which shapes he received a good deal. In large towns the same functions were performed partially or entirely by the mayor or some similar elected officer.

Summary Jurisdiction.—Below the Quarter Sessions there had been formerly in reality, and still were in name, certain petty local courts of criminal jurisdiction of a more or less popular character; the *sheriff's tourn*, the *court-leet*, and the court of the *clerk of the market*. But these had now been virtually superseded by the summary jurisdiction, as it was called, of one or more justices of the peace in *petty sessions*. This jurisdiction, unknown to the Common Law, had come by successive statutes, passed for the most part since the Revolution of 1688, to embrace a very considerable number of petty offences. Blackstone notices the change with anxiety, as fraught with serious danger to the liberty of the subject; praising "the prudent foresight of our ancient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men;" and insisting upon "the necessity of not deviating any farther from our ancient constitution, by ordaining new penalties to be inflicted upon summary convictions." Unfortunately there was a counter-necessity at work, of which he failed to take account, and which was destined, in the course of the next century, to multiply many times over the mischief which he deplored; the necessity, namely, of preventing, at whatever cost, the sheer anarchy which would otherwise have resulted from the hopeless inefficiency of the regular procedure. To that regular procedure we had better confine our attention for the present; this parasitical growth, if we may call it so without disrespect, merely as describing its historical relation to the main stem, will claim its full share of attention in the course of the subsequent history.

Preliminary Proceedings of the Regular Trial
—**Arrest.**—Of course the first point of pressing importance was to secure the attendance of the person to be

judged, which could not be expected to be other than reluctant. For this purpose any private person was not only entitled, but bound, on pain of fine and imprisonment, to arrest another person whom he saw committing a felony, or had strong reasons for suspecting of having done so; though, if it was only a misdemeanor, he would be guilty of assault and false imprisonment for the arrest, and of murder if he killed his prisoner. The reader who has noticed already the indifferent success of our attempt to explain the difference between a felony and a misdemeanor, will be able to appreciate the dilemma in which a well-intentioned layman might thus be placed. The instance given by a modern writer, that to conspire to commit murder was only a misdemeanor, while to steal a pennyworth of sweetmeats was felony, might be supported by several other scarcely less forcible illustrations, (p. 58). A constable, and *à fortiori* a sheriff or a justice of the peace, might arrest any one for a breach of the peace, whether felony or misdemeanor, committed in his presence.

The Magistrate.—But the ordinary course was for a Justice of the Peace, upon the oath of some person that a crime had been committed, and that there was probable ground for suspecting So-and-So, to give a warrant to a constable or other peace-officer to arrest and bring before him the accused person. It was then the duty of the justice to confront the prisoner with his accusers, and take down in writing the evidence offered in support of the charge, questioning the prisoner if he thought proper, and, at all events, taking down any statement the latter might think it prudent to make. If the result of this examination was to show a probable case against the prisoner, he was either committed to prison to await the next assizes, or required to find bail for his appearance when wanted, according as the gravity of the charge and other circum-

stances made it more or less probable that he would attempt to escape.

The Grand Jury.—There was still another process to be gone through before it was thought proper to set in motion the elaborate and expensive machinery of trial by judge and jury. Whether out of consideration for the liberty of the subject, or for the time and trouble of the authorities, the opinion of a single magistrate, that it was a proper case for trial, was not accepted as sufficient. It was further generally necessary to procure the sanction of from twelve to twenty-four gentlemen of good position in the county, selected by the sheriff, who, under the name of *the grand jury*, received in a secret sitting the evidence for the prosecution only, and authorised the *indictment* or *presentment* against the accused, if satisfied upon that evidence that it was a proper case to go to trial. It is probable that this, like every other obstacle thrown in the way of legal proceedings, may have occasionally operated so as to protect an innocent man from vexation; it is much more easy to understand its value as a protection to the class *from* which the grand jury were selected, and possibly to the political supporters of the Government of the day, *by* whom, through the sheriff, the selection was made, in cases where the rigour of the law was likely to prove inconvenient to them.

Judge and Jury.—The interval between these preliminary proceedings and the trial at the *assizes*, during which the accused was either detained in prison or out on bail, might be much less, but could not be more, than six months,—quite long enough, as the reader who remembers our description of an eighteenth century prison will probably consider. Twice a year the Judges of Assize—to give them the title by which they were and are popularly known, though it more properly describes their civil than

their criminal jurisdiction—travelled in pairs through their respective provinces, or circuits, stopping at every important town to try the cases, civil and criminal, which had been prepared for them. The two judges sat separately, dividing the business between them as convenient. It was the business of the sheriff of the county to secure the attendance at each place of properly qualified jurymen, taken from a list prepared by the magistrates at Quarter-Sessions. The ownership of land in some shape was, except in London and Middlesex, an indispensable qualification for serving on a jury. London and Middlesex might be considered as forming a circuit by themselves, but a circuit having only two places for the holding of assizes; namely, for criminal trials a court in the city of London, known as the *Old Bailey*, and for civil trials a court at Westminster, known as the Court of *Nisi Prius*. It was only when a criminal trial was of exceptional public importance that it took place *at bar*, i.e., in the Court of King's Bench itself, before all or two or more of the judges belonging to that court. At the Old Bailey, at *Nisi Prius*, and at bar, the jury were of course taken from London or Middlesex, the condition of land-owning being necessarily relaxed, owing to the small number of freeholders in and near the metropolis.

The Trial itself.—The proceedings began by calling the prisoner to the bar of the court, reading the indictment to him, and asking whether he pleaded *guilty* or *not guilty*. It has been already mentioned, that from the year 1772 he was no longer able, by refusing to do either, to save himself from conviction and his family from beggary at the cost of being pressed or starved to death (p. 74). It was usual to advise him to plead *not guilty*, even where he was himself disposed to confess; for what reason it is difficult to understand. Then the names of

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the jury were called over, and the prisoner was allowed to object to any number of them on showing that they had not the proper money qualification, or on giving a valid reason for suspecting their competence or impartiality, and to as many as twenty without assigning any reason whatever. The jury as ultimately constituted then took an oath, "well and truly to try, and true deliverance make, between our Sovereign Lord the King and the prisoner whom they have in charge, and a true verdict to give according to the evidence;" an oath which it was absolutely impossible for them to keep, unless the evidence happened to make the same impression on twelve different minds. The nature of the case was then explained to them by the counsel for the prosecution, from written instructions prepared for him by the attorney. In theory these professional persons represented not the accuser but the Government, the accuser being nothing more than a witness; the trial being an inquiry on behalf of the State into the circumstances of an alleged breach of the law; but no adequate machinery had ever been provided for giving effect to this theory, and the practice had been for a long time tending more and more towards treating the prosecution of all offences except those against the State as private litigations between the person immediately injured and the accused. The former had even to pay the expenses of the prosecution in the first instance, though the reimbursement of them out of the county rate had been recently and somewhat grudgingly allowed where the result of the trial showed that it had been instituted on reasonable grounds. One very curious relic of the old theory was, that the accused person was not allowed in some cases, though he was in others, to be represented by counsel, the counsel for the prosecution (and still more of course the judge) being supposed to be as much concerned to present to the jury the

points in his favour as those against him. Any point of law, however, which arose was always argued by counsel on both sides. After the case had been thus opened, the witnesses were brought forward one by one, examined by the counsel for the prosecution, cross-examined by the prisoner if he had sufficient skill to do so, or if some barrister was allowed, as a matter of special indulgence, to suggest questions for him; then re-examined by the former, in order, if possible, to remove any unfavourable impression as to their veracity which might have been produced by the cross-examination. The prisoner might bring forward witnesses on his own behalf, if he could induce them to come; but the coercive machinery of the law, which was freely employed to compel the attendance of the witnesses for the prosecution, was not set in motion for the benefit of the prisoner. Neither class of witnesses had any legal claim to be paid for their attendance, though the judges had latterly taken upon themselves to order such payment on their own authority.

Hearsay—Interrogation of the Prisoner.—It was the fixed rule of the Common Law Courts that all evidence must be given orally in this way, which was capable of being so given, even the witnesses who had already given their evidence before the magistrates having to come and give it over again, and, as a general rule, the only admissible witness to a fact was the person who would say that he had perceived it by his own senses. There was always some uncertainty as to the exact scope of this last principle, and it had been found necessary from time to time to admit a good many exceptions, but with all drawbacks there can be no doubt that the *rule against hearsay*, as it was called, supplied a most valuable check to the influx of irrelevant gossip by which the minds of an untrained jury would otherwise have been

confused; though perhaps to an old trained horse, say a judge like Lord Mansfield, the blinkers might have been unnecessary, and therefore injurious. But if the exclusion of comparatively irrelevant evidence was on the whole beneficial, it would only be on condition of procuring the fullest possible supply of relevant evidence. How far that condition was from being fulfilled in any of the English systems has been shown already; the criminal courts added a peculiar impediment of their own, by refusing to allow the prisoner himself to be interrogated, either with or without the formality of an oath. This was a rule which had only been introduced gradually since the Revolution, and it was still not very unusual to question him in an indirect fashion by calling his attention to particular parts of the evidence which told against him, and inviting him to offer an explanation. There were also formidable obstacles, which it would take too long to describe particularly, in the way of procuring and presenting to the jury any kind of documentary evidence, official or non-official. In all these matters it was the function of the judge to determine whether the jury should or should not be allowed to hear any piece of testimony, or see any document that might be offered.

Summing-up, Verdict, and Sentence.—After all the evidence and argument had been disposed of, it was for the judge to *sum up*, i.e., to explain to the jury the law applicable to the subject, to remind them of the most important points in the evidence, to criticise the arguments of the advocates, and generally to disclose to them as much or as little of his opinion on the question of fact as he thought proper. Then the jury, supposing that they had any doubts about the matter, retired from the court, and were kept in seclusion, without food or fire, until they could by some means arrive at an unanimous decision on

the question of fact; or, if they thought fit, on the general question of the guilt or innocence of the accused, including both law and fact. It was then the duty of the judge, if the verdict was for acquittal, immediately to order the prisoner's release. If it was for conviction, he would ordinarily sentence the offender to the legal punishment, as to the amount of which the law allowed him in most cases a tolerably wide discretion.

Modes of Reversing the Verdict.—This consummation, however, might sometimes be prevented by invoking the intervention of the chief criminal court of the realm, the King's Bench, which indeed had in theory the cognisance of the case from the beginning, the judge who presided at the trial being considered as its delegate. Such intervention might take several different forms. Occasionally, after conviction for a misdemeanor, the Court of King's Bench would order a *new trial* before another jury; but this power was much more sparingly used than in civil cases, only in fact where there were very strong reasons for suspecting a miscarriage of justice—never in a case of felony, and never in order to reverse a verdict of acquittal. Again, it might *arrest judgment*, which had the effect of setting aside the whole proceedings, though with liberty to commence a fresh prosecution, on the ground of any informality in any part of the trial.

Flaws in the Indictment.—Thus the indictment was required to state every circumstance with the most extreme particularity; and if it failed to describe the acts charged against the prisoner, so as to show the exact legal character of the offence, as, for instance, if it merely stated that he *killed*, instead of saying that he *murdered* (*murdravit*), the deceased, or if either his surname, or any one of his Christian names was omitted or wrongly stated, or if the facts proved, though sufficient to constitute the

legal offence, were different in any respect from the facts charged in the indictment, as if the blow was stated to have been given with the left hand when it was really given with the right, the *variance*, as it was called, was fatal to the whole prosecution, and it was immaterial whether the objection was raised at the commencement or after verdict. About the time of Blackstone, a dawning sense of shame or of danger had produced a relaxation in this strictness, which had, if anything, rather thickened the confusion. *Immaterial* particulars were still required to be stated, but no longer required to be proved. Thus, in a celebrated murder case, which occurred in 1781, "Donellan was indicted for poisoning Sir T. Boughton with arsenic. The proof was, that he poisoned him with laurel-water, and this was sufficient; but if the indictment had not mentioned any specific poison it would have been bad." (F. Stephen, "General View of the Criminal Law," p. 183.) But it was still necessary to prove, as well as to allege, "matters of essential description." Of the difficulty of determining what matter of description was essential, some idea may be given by a case, mentioned by Mr Pitt Taylor, in his work on Evidence, as having occurred in quite recent times. "A man was charged with stealing a *slop*. The theft was clearly proved; but, when called upon for his defence, the prisoner exclaimed, 'Why, my lord, it ain't no slop.' 'You hear what he says,' observed the judge, 'addressing the jury. 'Is it a slop, gentlemen?' 'No, my lord, it's a smock,' said one of the jurymen. 'Then you must acquit the prisoner.' He was acquitted; but, the grand jury not being discharged, a second indictment was preferred and found, charging him with stealing a *smock*. Nothing daunted, the prisoner now pleaded the previous acquittal, and called several wit-

"nesses to prove that the article he had stolen was in fact a sloop, and this question was submitted to a second jury with much gravity by the learned judge." There are, apparently, only two possible motives to which the maintenance of this state of things can be ascribed: one, a humane desire that as many prisoners as possible, whether innocent or guilty, should escape from the grasp of a law under which there were upwards of 160 capital offences; the other, the interest of all the persons with whom the arrangements rested in the multiplication of reputation-bringing and fee-producing business. The reader will mix these causes in such proportions as his charity or his cynicism may suggest; only bearing in mind, that whatever praise for humanity he awards to the framers of the procedure which so defeated the harshness of the law, implies corresponding blame for cruelty against the Legislature (largely influenced by the same individuals), by whom that law was maintained and sharpened. We may add that the prisoner was not generally allowed to see a copy of the indictment before the trial, and only heard it read in court, so that he could hardly avail himself of these loopholes until the maximum of sport and of fees had been extracted from the case.

Lastly, there was an appeal on any question of law from inferior courts to the Court of King's Bench, and from the King's Bench to the House of Lords; and if that failed the king might still be advised either to grant a free pardon or to mitigate the sentence.

Private Process for the Punishment of Crimes.

—This phrase, which, according to our definition of crime (p. 14), seems almost self-contradictory, is used by Blackstone to describe a curious relic of ancient manners, called the *appeal*. It applied to several kinds of felonies; but its character is seen in the case of murder, where the right

to resort to it, which would have been the exclusive privilege of the actual victim of the crime had he survived, was vested in his wife or his heir, but in no one else. If they believed their relative to have been murdered by a person whom the public authorities had for any reason abstained from prosecuting, or who having been prosecuted had been acquitted, or having been convicted had received a pardon from the Crown, either of them might demand the trial, or re-trial, of such a person, and his punishment if found guilty, as a matter of personal satisfaction to themselves. And even pecuniary satisfaction, like the barbaric *weregild*, might be obtained indirectly by this method; for the punishment might be remitted, even after verdict, at the discretion of the appellor, and there was nothing to prevent him from accepting a sum of money as the price of his forbearance. Blackstone, writing in 1763, speaks of these appeals as being rare; but in 1768 a proposal to abolish them was vehemently and successfully resisted as an infringement on individual liberty.

II. COMMON LAW CIVIL PROCEDURE.

Distribution of Business.—The Common Law procedure in civil cases was in many respects different, and not less remarkable. The constitution of the tribunal was so far the same that there was always a judge, or more than one, and a jury, and the same judges used at the assizes to try civil and criminal cases indiscriminately; but, whereas in criminal trials, whether actually tried at the assizes or at Westminster, the judges were always supposed to represent the Court of King's Bench, in civil cases, they might represent any one of the three superior courts. Properly speaking, all the ordinary civil business was supposed to come to the Common

Pleas, the Exchequer being only instituted for revenue cases, and the King's Bench having an appellate jurisdiction over the other two in all matters, and an original civil jurisdiction in the semi-criminal class of actions for wrongs involving violence, and also in cases where the defendant was an officer of the Court of King's Bench, or already in its custody for some offence. But in very early times, the judges being paid, as has been said, out of the suitor's fees, there had been a keen competition between them for business; and whichever might be the most popular court for the time being, judge and suitors would co-operate in devising means for bringing into it cases which properly belonged to one of the others. These devices consisted simply in some bare-faced falsehood stated by the plaintiff, which the colluding judge forbade the other party to contradict, and which thus became an established institution under the name of a *legal fiction*. Thus any kind of action could be brought into the King's Bench either by simply pretending that the defendant was in custody of the marshal of the court, or by charging him with some imaginary trespass of a forcible character, *and also—ac etiam*—with the real subject of the action, debt, or breach of contract, or whatever else it might be. Again, any action could be brought into the Exchequer by the plaintiff pretending that he owed money to the Crown and was unable to pay it, because the defendant owed *him* money and would not pay it. It does not appear that the Common Pleas ever retaliated by filching revenue cases from the Exchequer, or criminal cases from the King's Bench; both encroachments would doubtless have been resented by the Crown, and the latter would also have required the concurrence of the grand jury, and would have yielded little profit after all.

Local Civil Courts.—These three central courts, with their offshoots, the itinerating judges of assize and the Court of Nisi Prius at Westminster, had the field of civil business almost entirely to themselves. The ancient Hundred and County Courts having been disused, the only thing at all corresponding to the summary criminal jurisdiction of the magistrates was to be found in certain courts "of conscience," or "of requests," established in a few large towns by special acts of Parliament for the recovery of debts under 40s. With that trifling exception, those who could not afford to buy justice at the Westminster price had simply to go without it.

Commencement of Regular Process.—Coming to the civil procedure itself, we find that the method adopted for attaining the first object, the attendance of the defendant, amounted in substance to a notice served on the defendant, requiring him to find bail for his appearance when wanted, which, if not complied with in eight days, was followed by his arrest, with the alternative of bail or imprisonment. But such was the mass of fiction in which these essential facts were enveloped, that it requires a very careful perusal to extract them even from the narrative of so generally lucid and popular a writer as Blackstone. The notice to appear was in form a copy of an order for immediate arrest; this apparently harsh proceeding was justified by the fact that the defendant was supposed to have received at least three previous warnings of a milder character, viz., first by receiving an elaborate and expensive document, called an "original writ," stating in technical language the causes of action (real and fictitious), with several collateral falsehoods (a document which was not actually drawn up till a later stage, and then only if it proved to be wanted), and then by two successive orders to distrain upon his goods, both of which were absolutely

pecuniary interest in the result, were prohibited from appearing as witnesses, and could not be compelled either to answer written questions beforehand, or to produce their books and papers for inspection. The Common Law Courts had no adequate means of ascertaining the balance in complicated cross accounts, which, therefore, were either referred to arbitration or left to the Court of Chancery.

Execution.—Though the judgment was entered at Westminster, the fruits of it had of course to be gathered on the spot, which was done through the agency of the sheriff of the county. The extent of the unsuccessful defendant's liability, in person and property, has been described already as a matter of substantive law. It may be mentioned, however, to prevent misconception, that where the sheriff seized the goods of the defendant, he was expected not merely to deliver the specific articles, but to sell them to the best of his ability, and with the proceeds to pay the plaintiff's claim as far as they would go, and to return the surplus, if any, to the defendant; so that the plaintiff was not liable, as is said to have been the case recently in one of the Swiss Cantons, to have a cartload of manure deposited at his front door in satisfaction of his debt.

Costs.—If judgment was for the defendant, the plaintiff was ordered, fictitiously, to pay a fine to the Crown for his false claim; for the payment of which fine in such event he had duly found fictitious sureties (John Doe and Richard Roe) at the commencement of the proceedings. The unsuccessful party, whether plaintiff or defendant, had to pay the whole costs which his opponent might be held to have reasonably incurred, in addition to his own; an amercement which was by no means fictitious, as the reader will readily imagine.

III. OTHER SYSTEMS OF PROCEDURE.

Equity.—The procedure of the Courts of Equity, *i.e.*, that of the Lord Chancellor and one branch of the Court of Exchequer, differed from that of the Common Law Courts chiefly in the following points. Both law and fact were determined by a single judge, without a jury. There was nothing corresponding to the different forms of action at Common Law; the whole matter was presented to the judge by means of an informal written narrative, concluding with an indication of the redress asked for. No testimony was given orally in open court, the evidence consisting either of written *answers* on oath to written questions, called *interrogatories*, or of *affidavits*, *i.e.*, written statements, usually prepared by counsel or attorney, and signed and sworn to by the witnesses out of court, or of *depositions*, *i.e.*, evidence given orally out of court before an official *examiner*, and by him taken down in writing. All this evidence might be tested by cross examination, but only before the said examiner, so that the judge had at no time any opportunity of personal contact with the witnesses.

On the other hand, several means of eliciting truth were freely resorted to, from which the Common Law Courts considered themselves precluded. *Interrogatories* were required to be answered fully by the defendant as well as by other persons, and he was also compellable to allow the inspection of all books or papers in his possession. *Commissions* were issued to examine witnesses at a distance. Ample, though dilatory and expensive, machinery was provided for settling cross accounts, and for the management of estates during the pendency of suits relating to them. For the purpose of execution, Equity Courts professed to act only against the *person* of the defendant, and carried the principle so far, that if they came to the conclusion

that a piece of land legally belonging to one person ought in justice to belong to another, they never ventured to declare that it did so belong, but ordered the legal owner to make a legal conveyance of it, with what expense and delay may be imagined.

Collisions between Common Law and Equity.—

The strength and weakness of the two systems being so curiously balanced, it followed that in many cases the only chance of getting anything like complete justice was to let the suit be bandied backwards and forwards, perhaps two or three times, from one to the other; a hitch in the evidence at Common Law might necessitate a bill for *discovery* in equity; the Court of Chancery might send the case back to the Common Pleas or Exchequer for determination of a question of law, and so on. But the most singular of all equity processes was that by which, at any stage of an action at law, a Court of Equity would, if applied to under certain circumstances by the party who was getting the worst of it, step in with an *injunction* requiring his opponent to stay proceedings on pain of commitment for "contempt of court," and proceed to deal with the case on its own principles.

The costs and delay in these courts, owing partly to the nature of the subjects dealt with, but more to the substitution of written for oral testimony, were enormously greater than even those of the courts of law.

Ecclesiastical Procedure.—The procedure of the Ecclesiastical Courts in relation to certain civil matters, namely, wills, the distribution of the personal property of intestates, and questions properly ecclesiastical, approached more nearly to that last described than to that of the Common Law Courts, though with considerable differences, which indeed were made to appear greater than they really were, owing to the use of an entirely different nomenclature.

The criminal, or quasi-criminal procedure of these courts was unlike anything else in the kingdom. The substitute for punishment was *penance*, i.e., some kind of self-mortification imposed for the good of the delinquent's own soul; the consequence of non-submission to such penance, or of failure to appear in answer to the charge, the penalty was *excommunication*, which was also the only method of punishing false evidence, or refusal to give evidence. This consisted, in addition to the spiritual part, which necessarily depended for its efficacy on the religious sentiments of the delinquent and his neighbours, of an incapacity to bring any action, with several minor disqualifications; and if the offender did not submit within forty days the aid of the Court of Chancery was called in to imprison him. The practical result was, that both penance and excommunication were indirect methods of extracting money payments.

The Admiralty Procedure was also based on the Roman law, and requires no special notice. The ultimate appeal from both the last-mentioned jurisdictions was not, as in other cases, to the House of Lords, but to the king in Council.

CHAPTER V.

LAWS RELATING TO SPECIAL CLASSES OF PERSONS.

I. SPECIAL PRIVILEGES AND DISABILITIES.

Special Legal Privileges.—With these, as affecting the private rights of individuals, the English nation, considering how aristocratic it was both politically and socially, was singularly little encumbered. *The sovereign* was exempt from all criminal liability for his acts, and his liability on contracts and civil injuries was theoretically a matter of favour rather than of right. *A peer of the realm* had the privilege of being tried for treason or felony only before the House of Lords or a jury of his fellow-peers; of giving on some occasions (though not in the witness-box) his mere word of honour instead of an oath; and of being able to proceed criminally as well as civilly under the name of “*scandalum magnatum*” for such scandalous words as, if spoken of a commoner, would not even have been actionable as slander. As members of the Legislature both they and members of the House of Commons were exempted from arrest on civil process during the session of Parliament. The disqualifications of the bulk of the community under the game-laws, already described, were virtually equivalent to a special privilege vested in the classes not so disqualified—perhaps the only one which could be considered seriously oppressive.

Special Disabilities—Dissenters.—The disabilities which applied to Papists only were of a really penal character, and as such have been noticed elsewhere. Of those affecting Protestant dissenters, as well as Papists, the chief were those derived from those well-known acts of Charles II., the Conventicle Act, the Corporation Act, and the Test Act. The effect of the first, even as modified by the Toleration Act of William and Mary, was to make public preaching or public worship at variance with the general tone of Protestant, Scriptural, and Trinitarian Christianity well-nigh impossible. By the second, no person could be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he had received the sacrament of the Lord's Supper according to the rites of the Church of England. By the third, all officers of the Crown, civil and military, were required to take the sacrament in like manner, and also (among other things) to make a declaration against the doctrine of transubstantiation, within six calendar months after their admission. But here also, with that curious inverted hypocrisy which sometimes leads English legislators, as well as individual Englishmen, to do right as it were by stealth while loudly professing their determination to do wrong, it had been for many years the practice to pass annually an Act of Parliament to indemnify those who had not qualified themselves by taking the test from the consequences of their disobedience. Dissenters of all kinds were, however, absolutely excluded from the House of Commons.

Aliens were disqualified from holding real or leasehold property in England, in addition to their political disabilities, which do not now concern us.

Women.—Besides being "disqualified from all political functions except that of reigning," in the region of

private law women were subject, simply as such, to a few special disadvantages; the most important being their postponement to males in the order of succession to real property, and the most singular being, that their sex was alone liable to the ancient punishment provided for a "common scold," viz., to be placed in an instrument called the "cucking-stool," and plunged into the water (p. 62). On the other hand, it would be difficult to indicate a single point in which a woman, merely as such, received from the law of this period either special protection or special indulgence; unless we consider it an indulgence that, if convicted of treason, she was to be burnt alive instead of being disembowelled.

Children, as such, were disabled up to the age of twenty-one from discharging any political functions, and had the privilege of not being bound by any contract except for *necessaries*, i.e., such things as a jury of tradesmen might consider suitable to their station in life. Children too young to understand the nature of an oath were disqualified from giving evidence in a court of justice; children under seven were absolutely exempted from legal punishment, and those between seven and fourteen might be so exempted if it appeared that they did not know they were doing wrong. But the law, whatever the judges might do in practice, recognised no degrees in the moral responsibility of young people, and instances were recorded of a girl of thirteen having been burnt for killing her mistress, and of a boy of eight having been hung for arson.

Lunatics.—The legal protection accorded to real or supposed lunatics was very inadequate. Before 1774 any person could place an alleged lunatic under confinement, subject to the consequences of assault and false imprisonment if he failed to prove the alleged lunacy, on being called upon to do so; but in order to put the management

of the lunatic's property into other hands it was necessary to apply to the Lord Chancellor, who would first issue a commission to inquire as to the fact of lunacy (*de lunatico inquirendo*), and on that being proved, would appoint some person, generally the nearest male relative of the lunatic who had no pecuniary interest in his death, to take charge of both person and property. This *committēe* could, of course, be called to account by the same authority, but there was no regular supervision. In 1774 the plan was introduced of requiring every keeper of a madhouse for the reception of more than one lunatic to take out an annual licence from the College of Physicians or the magistrates in sessions, and to receive no one as a patient without a medical certificate. But the securities for supervision under this Act were extremely defective, and in truth no supervision was likely to do very much good at a time when the notions current in high places as to the proper treatment of lunatics were so barbarous and unscientific as those which we know to have been applied at one time to King George III. himself.

Idiots.—There was a legal theory that, if a person were found by the verdict of a jury to have been *born* absolutely without intelligence, the king should take the whole profits of his lands, as well as the custody of his person, without rendering any account; but as juries seldom or never did find such a verdict, no great harm was done, and idiots were practically in the same position as lunatics.

Paupers.—The history of the poor-laws is omitted, as a subject more economic than legal, though it might, no doubt, be considered under either aspect.

Professions, Trades, and Employments.—These were not subject to nearly so many special regulations as at present. *Barristers* were then, as now, specially pri-

vileged from civil responsibility to their clients, and on the other hand disabled from suing for their fees. *Attorneys* had their scale of charges fixed for them by authority *Clergymen* of the Established Church had certain privileges not worth particularising, and were disabled, even when unbeneficed, and even if they desired entirely to put off the clerical character, from engaging in any trade, even as a sleeping partner, or in any lucrative employment except teaching and literature. *Soldiers* and *Sailors* were of course subject to martial law, the rigour of which struck even Blackstone as excessive, but enjoyed, on the other hand, among other small privileges, that of making informal wills, like the soldiers of the Roman Empire. But perhaps the strangest kind of restriction imposed at this time on any branch of industry was that affecting the *theatrical profession*. It seems almost as though the neighbourhood of royalty were expected to have some mysterious effect in purifying and elevating the stage, analogous to that which the royal touch was formerly supposed to have in curing certain diseases; for, under an Act of Geo. II., no dramatic performance was allowed to be exhibited for gain without patent from the king, or licence from the Lord Chamberlain, neither of which could be granted for any place except the city of Westminster or the king's place of residence for the time being. In 1788 this was so far modified that the county magistrates were allowed to grant licences for provincial performances of plays already licensed for Westminster, or approved by the Lord Chamberlain.

Fictitious Persons.—In most systems of law it is found convenient sometimes to treat (1) a body of persons acting jointly, or (2) a succession of individuals holding the same office, or even a particular piece of land, nay, even (3) the claims and liabilities under a particular head of

account, as distinct legal entities, or if we choose so to call them, legal *persons*. The last-mentioned class, *e.g.*, the Treasury, the War-Office, &c., are not recognised under those names in the strict language of English law, though the Roman law habitually spoke of the Imperial Treasury ("*fiscus*") as a "*persona*;" the second and first are respectively denominated in English law *corporations sole*, and *corporations aggregate*. The only instances given of corporations sole are, the king, and the person of a parish. Corporations aggregate are of three kinds—(1) *municipal*, which belong rather to constitutional law; (2) *religious or charitable*, the chief legal features of which have been noticed in connection with mortmain and trusts; (3) *commercial*, which require more particular notice in this place.

Joint-Stock Enterprise.—If a number of persons wanted to carry out some commercial undertaking with their joint resources, there was practically no way of doing so unless they could get the Crown or Parliament to constitute them a corporation; for the only alternative was to create an ordinary partnership on a gigantic scale, wherein every member would be able to bind every other by his contracts, every member would be liable to his last farthing for the partnership debts, every member would have to appear individually as a party to every legal proceeding taken by or against the firm, and no member could transfer his share without the consent of all the others. When, in spite of all these difficulties (so strong were the inducements to large speculative undertakings), numerous joint-stock companies were formed on this footing, the Legislature regarded them simply as nuisances, and passed an Act, called the "Bubble Act," after the famous "South Sea Bubble," to put them down altogether; notwithstanding which they continued to increase in number and im-

portance. If, on the other hand, they did get themselves incorporated, since they could not all flourish like the East India Company, they might happen to find their legal immortality as inconvenient as that of Tithonus, or that of the Struldbrugs of Gulliver's Travels. The objects for which the corporation was established might have ceased to be desirable or attainable; its constitution might be fatal to good management; it might be impossible to fill up the vacancies with fit persons, or with any persons; still, so long as nothing was done or omitted which could occasion a forfeiture, and any single member refused his consent to its dissolution, nothing short of an Act of Parliament could terminate its existence. And even during its existence, a corporation was much hampered by (amongst other causes) the general rule that it could only contract by deed. The pressure of everyday business absolutely necessitated some relaxations of the rule; but as nobody could fix exactly the point at which such relaxations were to commence, room was left for any amount of litigation.

II. PERSONAL RELATIONS.

We come now to the legal consequences, in the way of authority and subordination, or otherwise, which result from the *personal relation* in which one man may stand to another.

Husband and Wife—Marriage.—Under a recent Act, 26 Geo. II. c. 33, greatly narrowing the ancient liberty of the subject on this point, this relation could only be constituted through the performance of the Church of England marriage-service by an ordained clergyman of that communion in some parish church or public chapel, the intended marriage having been publicly announced in church on three previous Sundays, unless this last requirement were dispensed with by a licence, obtainable

for money from the Archbishop of Canterbury. The same statute had also introduced, for the first time, the principle, that the marriage of a minor required the consent of the father or guardian. "There exists," says Bentham, "a very singular custom in a country of Europe celebrated for the wisdom of its institutions. The consent of the father is necessary to a minor, *unless* the lovers can run a hundred miles without being caught. But if they are so lucky as to arrive at a certain village, and to procure at the moment some passer-by to pronounce a nuptial benediction, without any questions asked or answered, the marriage is valid and the father is ousted of his authority." The allusion is to the rule that a marriage between English subjects validly performed in a foreign country, according to the law of that country, was valid in England; Scotland was for this purpose a foreign country, and the Scotch law as to the celebration of marriage was of a very free and easy character; hence the popularity of "Gretna Green marriages," celebrated between runaway couples by a certain blacksmith at a village just over the border.

Divorce.—The marriage so constituted could never be dissolved by any power except that of Parliament itself; but latterly private Acts of Parliament for this purpose had become so common, that it would be almost correct to say that divorce was allowed by law to the wealthiest class of the community, and to them only. A separation "from bed and board," however, could be decreed by the Ecclesiastical Courts on account of gross misconduct on either side, with suitable arrangements for the maintenance of the wife, if innocent, or to some extent if guilty; but even this resource must have been practically inaccessible to five-sixths of the population. *Bigamy* by either party was a *clergyable felony*.

Marital Rights of the Husband.—The legal effect of the marriage was, that the husband took to himself, in the ordinary course of things, the whole of his wife's property, rights, and liabilities. Her real property, it is true, reverted to her if she survived him, or to her heirs after the death of both, and could not be alienated by him without her consent; but her personal property, other than leasehold, became absolutely his after he had once taken possession of it. Her leasehold property he could dispose of in his lifetime, but not by will, so that she had a chance of recovering it if she survived him; and she had nothing to do with either during the marriage. If, however, the wife's property was sufficiently large to attract, and repay, the attention of the Court of Chancery, it might, by means of special arrangements enforceable in that Court only, be reserved for her separate use; and about this time a further provision was invented to protect her from her own weakness, by restraining her from parting with the capital of such separate property under her husband's persuasion or otherwise. But it was still impossible for her to recover any part of her separate income which her husband had once been allowed to get hold of. Contracts made by her were only binding where it could be shown, or at least pretended, that she acted as his agent, and he alone could sue or be sued in respect of them. In actions for civil injuries committed by or against her, both were jointly plaintiffs or defendants, but the real party was of course the husband, as his was the only hand which could either pay or receive damages. But the fiction of husband and wife being one person was not pressed with such rigorous logic as to punish him for her offences, except when they were committed in his presence, in which case she was presumed to have acted under his coercion, and was in general excused accordingly.

As regards her person, Blackstone tells us, in a somewhat timid and hesitating manner, that modern decisions were adverse to the ancient right of the husband to beat his wife in moderation; though he intimates, not obscurely, that the new law was still a dead letter as regards the lower orders; and "the courts of law will still," we are told, "permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour."

Rights of the Wife.—In return for these sacrifices of property and personal liberty, a married woman gained the right of dower already described (p. 42) in case she survived her husband, and a right in the same event to (according to circumstances) either one-half or one-third of his personalty, unless he chose to deprive her of the latter resource by his will. In strictness of law she had absolutely no other equivalent; for the protection and maintenance which she no doubt in most cases received was not really enforceable as a legal duty until she actually became chargeable to the parish, when of course it was a benefit to the rate-payers rather than to her. If he chose to live himself like a prince, and feed and clothe her like a scullery-maid, there was no way in which she could obtain redress, unless she could induce some one to trust her with articles suitable to his rank, in which case a jury might perhaps afterwards oblige him to pay for them as "necessaries," which she had implied authority to contract for. Blackstone concludes his chapter on this topic with the exclamation, "so great a favourite is the female sex of the laws of England!"

Parent and Child.—The legal relation of parent and child (by which is meant, practically, that of father and child, since the mother's rights amounted to almost nothing) may be dismissed very briefly. The obligation of maintenance was only directly enforceable where the

children were helpless and unable to work through infancy, disease, or accident, and then was confined to necessities (in the literal sense), the penalty for refusal being only 20s. a month. It did not include education, though this, as well as other "necessaries" in the larger legal sense, might possibly be obtained in some cases for the child in the same indirect manner as for the wife, by contracting a debt which the father would have to pay. Moreover, contrary to the practice of almost every other civilised nation, the father was allowed absolutely to disinherit his children by will, without alleging any reason, unless their interests had been specially secured by arrangements entered into before the marriage. The obligation of maintenance, such as it was, was reciprocal, the son of full age being obliged to prevent his impotent father from becoming chargeable to the parish. The English law contrasted more favourably with the continental systems in making the father's authority terminate absolutely when the child attained the age of twenty-one. While it lasted, he could delegate it to any one at discretion, and could continue it after his death by appointing a guardian of his own choice, without any reference to the wishes of the mother, who only became guardian in the absence of any disposition on his part. While he lived, he was not even allowed permanently to divest himself of his authority in favour of the mother or of any one else; though, for gross misconduct, he might be deprived of it by the Lord Chancellor, who in this and other matters was supposed to represent the king in his capacity of universal parent.

PART II.

Life and Work of Bentham,

CHAPTER I.

BIOGRAPHY.

State of Legal Education.—If the preceding sketch has not given a very lucid idea of English law as it was at the commencement of the reign of George III., the reader may at all events flatter himself that he can hardly know less about it than was known by nine out of ten educated laymen, or perhaps two out of three of those engaged in its administration. No law but the Roman law, and very little of that, was taught at either University, and the Inns of Court in London, founded expressly for the study of the Common Law, had long ceased to do anything whatsoever for legal education. To the total want of living instructors was added an almost equal want of readable text-books. It was becoming the custom for students who really meant business to enter an attorney's office at a very early age, where they spent years in copying legal instruments and picking up the details of such processes as those described in Pt. I., ch. iv., after which they went through a corresponding course in some special *pleader's chambers*, and lastly sat in court under their

favourite judge, watching, and perhaps reporting the proceedings. The crowd of non-professional students who, in earlier times, had been wont to frequent the Inns of Court as the fashionable mode of completing a gentleman's education had naturally disappeared, while the duties of magistrates and legislators were none the less confidently assumed by the same class, with results which are very easily traceable in the statutes of the period.

Blackstone's Commentaries.—A laudable attempt to improve this state of things was made by a worthy man named Viner, himself the compiler of an "Abridgement" of the law in 24 thick volumes, by founding a professorship of law at Oxford, with fellowships and scholarships attached. The first "Vinerian" professor was one of whom, if of any one, a lax moralist might be tempted to say, "we could have better spared a better man." The problem to be solved was this. Given a system which to discuss is to condemn, but which no one has any inducement to examine, except those who have a sinister interest in maintaining it; given a lay public, the only reading part of which is the leisured and luxurious class, who, for the most part, read only what pleases them and flatters their prejudices; how to force on a discussion? The hope of the reformer must be that the idol-worshippers may be induced by some hierophant to put such confidence in his skilful daubing and dressing of their idol as to parade it in public and follow it about with acclamations, in which case an impression may possibly be produced by stepping forward to strip off its disguises and lay bare its deformities. Just such an hierophant was Blackstone. In the course of a life which had been divided between the society of an Oxford College and practice as a barrister, he had acquired a considerable store of miscellaneous erudition, a mastery of elegant language, and ideas in some points of

really enlarged benevolence, together with a perfectly marvellous faculty for putting plausible glosses on ugly facts, sometimes for making words supply the want of facts of any kind, and for flattering or coinciding with the characteristic weaknesses of the society among which he moved. It was the fruit which might naturally have been expected from a system of university education which began with perjury, which offered its chief prizes for exercises in adulation, which systematically repressed every movement towards independent inquiry, and while subordinating substance to ornament, ended by doing almost as little for the latter as for the former.

The lectures so delivered accomplished their object, attracting what for Oxford in those days was a good attendance, receiving a flattering notice from the Prince of Wales, and being largely read when published as "Commentaries" by people who had never looked inside a law-book before. They have continued to form the groundwork of nearly every comprehensive text-book to this day. The author, whose practice had hitherto been small, rose rapidly in the estimation of his contemporaries, and found himself, after no long interval, first a member of parliament, and then a judge.

Early Life of Bentham.—Among Blackstone's auditors in 1763, though only for a few lectures, was a diminutive lad of sixteen, named Jeremy Bentham, who had, as the modern reader may be surprised to hear, already taken his degree as a Bachelor of Arts, and had just kept his first term at Lincoln's Inn. Such a start was somewhat unusually early even for those days (Blackstone and Gibbon entered Oxford at fifteen), and was due to his being the singularly precocious child of a pushing ambitious father. There was no "double firsts" or university scholarships in those days; but he had gained such dis-

tion as was attainable, first in the logical disputations then in vogue, in one of which he beat not only his antagonist, but also the presiding moderator, and again by a Latin ode on the accession of George III. In truth, however, poetry was about the last pursuit for which nature had intended him. It has been remarked that his mind was fertile enough in images; but that, though often striking and appropriate, they were seldom beautiful. His true field of action he discovered somewhat later. He had once been asked, in his character of infant prodigy, to entertain the company by defining "genius," at which he naturally looked foolish and said nothing; but years afterwards, when he was about twenty, something in his reading reminded him of it, and it occurred to him that "genius" ought, according to its etymology, to mean "production." The rest may be told in the words of his biographer, which are almost his own. "'Have I a *genius* for anything? What can I *produce*?' That was the first inquiry he made of himself. Then came another, 'What of all earthly pursuits is the most important?' 'Legislation,' was the answer Helvetius gave. 'Have I a genius for legislation?' Again and again was the question put to himself. He turned it over in his thoughts; he sought every symptom he could discover in his natural disposition or acquired habits. 'And have I indeed a genius for legislation?' I gave myself the answer, fearfully and tremblingly, 'Yes.'"

He had already seen quite enough in his short professional experience to stimulate such aspirations, and proportionately to disgust him with the path which his father had marked out for him. He himself has told how, on being called to the bar, he found a cause or two at nurse for him, and how his first endeavour was to put them to death, in which he was not altogether unsuccessful;

how, on a subsequent occasion, he was disgusted to find that an opinion of his, right according to all accessible sources of law, was held to be wrong on the strength of a decision reported only in manuscript, and kept secret until it was thus used; and how even earlier, in the memoirs of a certain lady, who had the misfortune to get into the Ecclesiastical Courts, "the demon of chicane appeared to him in all his hideousness." He "went to the bar as a bear to the stake, going astray this way and that way," but chiefly in speculations on morals and legislation. It was in his twenty-second year that he met, in a pamphlet by Dr Priestley, the phrase which became the guide of his life and the symbol of his faith—"the greatest happiness of the greatest number." Whatever may be the exact degree of merit or novelty in the phrase itself, whether it be or be not superior in clearness and comprehensiveness to the various other terms—right, duty, justice, will of God—by which different persons, who mean substantially the same thing, prefer to express themselves, this is not the place to inquire. There can be no question as to the benefit which the world has derived from its effect on the mind of Bentham. Having found a standard, which he felt to be at all events itself true, whatever else might be equally so, he could fearlessly set about measuring by it the laws and institutions under which he lived, and solving the practical problems suggested by their deficiencies. From that time forth he marched straight forward as one who had a consciousness of his mission.

The Fragment on Government.—With the exception of a few slight and fugitive pieces, his first literary effort was an attack, under the title of "*A Fragment on Government; or, a Comment on the Commentaries,*" on the introductory chapter of Blackstone's *Commentaries*.

or rather on those few pages in that chapter in which the author, digressing from his main subject, discusses the theoretical basis of government, the different forms of government, and the especial merits of the British Constitution. The boldness with which he undertook to measure himself with the most renowned legal writer of the day, was amply justified by the event. Published anonymously in 1776, the work was variously attributed to Lord Mansfield, Lord Camden, and Lord Ashburton (better known as Dunning the advocate). What is more to the purpose, it is quoted to this day, not merely as an effective piece of destructive criticism, but as constituting the foundation-stone of a solid and durable fabric of political science, still very far from complete, but already appearing above ground, and continually rising higher and higher. For the leading definitions now generally accepted, the student of that science is, as a matter of course, referred to Mr Austin; but he will find Mr Austin referring at every step to the "Fragment on Government" as the original source of the conceptions, which he has only worked out with somewhat greater accuracy.

View of the Hard Labour Bill.—The next time that Bentham came before the public it was as a critic indeed, but also as a coadjutor of his old antagonist. In the meantime, the mission of John Howard (p. 63) had stirred the public mind, and the abuses of our prison management came to a head when the American war of independence closed the old outlet for transportation. Thus it happened that in 1778 Blackstone was engaged with others in pressing forward a bill for erecting certain new *penitentiaries*, and for organising, on a larger scale and with more method than anything hitherto attempted, a system of hard but healthy and useful labour, combined with religious and *moral instruction*. Bentham entirely approved of the main

object, and his "View of the Hard Labour Bill" was mainly directed towards popularising the subject, by presenting the measure in a readable shape; but he also suggested many ingenious improvements, some of which were adopted. The bill became law, and Blackstone was enabled to insert an account of it in a new edition of his work, with anticipations, for him unusually sanguine, of a general reformation to result from it. On Bentham it acted as a stimulus to further efforts in the same direction, which ceased only with his life.

Acquaintance with Lord Shelburne.—The story of that life, when its main object had been once for all determined, may be dismissed shortly. The success of the "Fragment," whose authorship soon became known, led to an acquaintance, and that to a close and permanent intimacy, with Lord Shelburne, afterwards Marquis of Lansdowne, who was the head of a short-lived Whig ministry in 1782. Once only in the course of that intercourse do we regret to observe something like an exception to the perfect independence by which it was generally characterised, when Bentham fancied, apparently under a misconception, that he had an offer from his powerful friend of a seat in Parliament. A correspondence ensued, in which the nobleman appears to greater advantage than the philosopher, and the matter ended in a renewal of the old intimacy. It is useless now to speculate whether the world would have gained or lost by a short (it could hardly have been a long) immersion of the philosopher in practical politics, or what sort of encounter would have taken place between him and Burke, minds so different from each other, yet so alike in their unlikeness to common-place politicians.

Remainder of his Life.—With the exception of one really adventurous visit to the interior of Russia (1785-7),

where his brother was acting as a kind of pioneer of civilisation under the auspices of the Empress Catherine, and of a few short visits to France, his whole life to the age of eighty-three was spent in the profoundest outward tranquillity, not to say monotony. One grand and absorbing pursuit sufficed to keep him healthy and vigorous without any other change or excitement, at the same time that it seemed to require, and to justify, the peculiar tactics which he adopted. Those tactics might be summed up in two words, independence and seclusion. Inheriting a moderate competence, which he did not attempt to increase, and renouncing all the ordinary objects of ambition for which men need either patrons or popularity, he presented the smallest possible front to attack. By avoiding on the one hand all merely general society, and on the other hand all personal contact with his opponents, he thought to economise his time to the utmost, and to preserve his temper and judgment in the midst of bitterness. That the plan had its disadvantages was only too true. Paying little attention to the labours of others, and working out every problem for himself, he occasionally announced things generally known with the air of an original discoverer. The seclusion which saved him from personal bitterness made him sometimes unjust to whole classes, imputing to bad motives what was really the result of a very natural ignorance, and fancying that what was plain to him from his lofty tower of speculation must be equally so to those who were toiling in the labyrinth below; for *tact* cannot exist without *contact*.

Change of Literary Style.—To the same cause may partly be attributed a marked change in his literary style. His earlier writings had been popular, telling, and readable. After 1810 or thereabouts, no terms seem accurate enough *for him* but those invented by himself, and no sentences

complete which leave anything to be understood; while the composition is lubricated by an elephantine sort of humour which not every reader is likely to appreciate. Fortunately a fit interpreter appeared in the person of a lawyer of Geneva, named Dumont, who employed himself during many years in working up Bentham's raw materials into a form of his own, adapted to the taste of the French public. Hence it happens that, to this day, some of Bentham's most important works, certainly those which are most widely read, exist only in the French of Dumont, or in a retranslation from the same.

So much for the method of working; now for the work itself.

CHAPTER II.

THE WRITINGS OF BENTHAM.

General Nature of his Work.—His aim was nothing less than to bring his favourite principle, “the greatest happiness of the greatest number,” to bear on every part of human existence, but more particularly on legislation. In the field of private law, with which alone we are here concerned, the three main subjects on which his best efforts were expended were, (1) the form of the law and its promulgation; (2) the rationale of punishment; (3) the law of procedure and evidence: for the law relating to the distribution of rights, called by him the Civil Code, he had sketched the outline of a plan of reform, but had not worked it out so thoroughly in detail.

Codification and Promulgation.—His arguments in favour of a code were such as most people are now familiar with, though they sounded new and strange to his legal contemporaries. For the promulgation of the law he proposed, amongst other things, that the general part of the code should be used as a text-book in schools and read in churches, and that the chapters concerning particular conditions and personal relations should in like manner be specially forced upon the attention of those about to enter those conditions and relations,—the law of husband and wife, for instance, at the time of the marriage. *He also proposed to extend much further a practice, not*

altogether unknown to English jurisprudence, of requiring important contracts and declarations to be written on stamped paper, which should bear upon its margin a notice of the laws relating to the transaction in question.

It was a much bolder step than this when he went on to insist that the code, or codes, should be accompanied by a running commentary, setting forth the *reasons* for each particular provision. It was his view that by such a plan several purposes would be secured at once; the goodness of the laws themselves, since for a bad law it would be difficult to find reasons which its author would not be ashamed of; the making them more interesting and effective as instruments of education; the conciliating the approbation of the people, and so facilitating their enforcement; the affording a clue to the judges in interpreting any doubtful enactment. Nor was he content with advocating codification in the abstract; we have among his remains, besides an outline of a complete body of law, with statements of leading principles and definitions, also several specimens of considerable portions, divided into chapters and sections, and in all respects ready for actual enactment.

Penal Law.—Here he starts with the principle that the art of penal legislation is the art of combating one evil by another; that therefore the only case in which an act ought to be made a punishable offence is that in which the pain resulting from the act in question is greater than the pain which will have to be applied in the way of punishment if it is to be effectively prevented; and that, even then, punishment should not be employed so long as any less expensive means of prevention are available. For this calculation a catalogue and comparative estimate of human pains and pleasures was of course requisite, and was supplied by him to the best of his ability. As might be

expected, his proposed list of offences differed largely from that of the actual law of his day. Conspicuous by their absence are very nearly the whole of the offences relating to religion, and the offence of usurious money-lending. The latter had been the subject of one of the best known of his earlier works, the "Defence of Usury." Among his new offences was included cruelty to animals, towards whom his sympathies were always very warm, in the concrete as well as in the abstract.

Remedies Against Offences.—Remedies other than penal he classified as *preventive*, *suppressive*, and *satisfactory*. With regard to the first two he made many ingenious suggestions, and the third topic is almost entirely his own. Contrary to what was, as we have seen, the practice of English law, he insisted that satisfaction ought always to accompany, if it did not supply the place of punishment. If it was worth while to inflict pure pain for the sake of preventing a greater pain, it was surely worth while for the same purpose to inflict pain on one person in such a form as to give pleasure to another person; moreover, the worst part of the evil of an offence was the alarm caused by it to those exposed to similar acts, an alarm which could never be entirely removed by punishment, but could be removed by the certainty of adequate satisfaction. Neither should the satisfaction be always pecuniary; money was a cure for many evils, but not for all. The other kinds which he considered to be unduly neglected were: 1st, *restitution in kind* (sometimes, though rarely attainable by the law as it stood); 2nd, *attestative satisfaction*, i.e., to remedy the evil of a falsehood by the legal attestation of the truth; 3rd, *honorary satisfaction*.

Honorary Satisfaction.—His treatment of this last in connection with the subject of duelling is very curious.

First, the morality of duelling itself is discussed; the apparent injustice of public opinion in heaping fresh insults on the man who has declined to avenge a first insult by challenging his oppressor is eloquently set forth; it is then shown that this apparent injustice is really a measure of self-defence on the part of a community which needs the co-operation of all its members for the repression of aggressive insolence, and cannot afford to tolerate cowards or sluggards in its ranks. Lastly, the true remedy for the evil is indicated, that of extending the same legal protection to mental as to bodily feelings, and thereby rendering unnecessary the violent, dangerous, and inefficacious remedy of private combat. But it is forcibly urged that the legal satisfaction, to be such in reality, must be analogous to the injury. A money payment would be very like a fresh insult; but to impose appropriate humiliation on the offender in presence of the injured person would be a very different matter. A list of such methods is given, some them designedly theatrical and grotesque. The most obvious and easy of all, the requirement of a formal apology in presence of those who were witnesses to the insult, and of those whose good opinion is specially important to the person insulted, is of course not omitted. A fifth kind of satisfaction, the *vindictive*, he does not scruple to recommend, so far as to consider a punishment otherwise expedient all the better for being so arranged as to give to the injured person the fullest possible feeling of gratified vengeance.

Whatever the kind of satisfaction, Bentham would have it awarded not only, as in England, at the expense of the wrongdoer, or of any one who may be specially responsible for his good conduct, but even in the last resort at the expense of the public treasury, rather than that the immediate sufferer should remain unrelieved.

Punishments Proper.—The qualities which he chiefly looks for in a punishment are—

(1.) That it should admit of degrees, so as to be easily measured, divided, and apportioned according to circumstances.

(2.) Exemplarity: that the suffering apparent to the minds of those who are to be deterred by the example should be at all events as great as, and, if possible, greater than the real suffering.

(3.) Popularity: that such allowance should be made for even misdirected feelings on the part of the people as not, without absolute necessity, to transfer their sympathies from the injured person to the criminal.

(4.) That it should be *characteristic*, *i.e.*, that there should be, if possible, some outward resemblance between the offence and the punishment, so that the image of it should present itself vividly to the mind at the moment of temptation.

(5.) Simplicity of description.

(6.) Remissibility.

These being the qualities wanted in a punishment as such; if, in addition, the same operation could be made subservient to the collateral ends of reforming the criminal, disabling him from further mischief, and compensating the injured person, so much the better.

All these requirements he summed up in his favourite term *frugality*, *i.e.*, causing the least amount of pain that would answer the purpose.

Prison Reform.—Measuring by these standards the different possible kinds of punishment, he early came to the conclusion that in the capital kind, then so lavishly employed, the evil outweighed the good if it were applied to any crime except homicide or rebellion, and in his later views he admitted no exception whatever. As to the

other kinds, classified by him as Afflictive, Indelible, Restrictive, Compulsive, and Ignominious, there is not one the use of which he did not, in some of his works, in some shapes, and under some circumstances, recommend. But his views of what it was, in his generation, practically possible to introduce, became gradually concentrated on a combination of the restrictive and compulsive kinds, in other words, on imprisonment with hard labour. He was certainly entitled to assert that it had never yet had anything like a fair trial, in England at all events. Blackstone's "Hard Labour Bill" had passed indeed, as we have seen, but no "penitentiary house" was ever built under it; the affair ended in an abortive negotiation for land which was never purchased.

The "Panopticon" Scheme.—Bentham's own meditations led to no result until his visit to Russia in 1787. There he was attracted by a contrivance of his brother's for keeping a numerous body of work people constantly under the eye of the superintendent by means of a circular building divided into compartments, with an elevated lodge in the centre commanding a view of the interior of every compartment, and at the same time so constructed that the workmen could never tell at each particular moment whether they were being inspected or not. It occurred to him that this architectural arrangement was still more applicable to a prison. Having once secured, as he conceived, this indispensable requisite of constant supervision, he was prepared to attack, in a far more vigorous and hopeful manner than before, the main problem, how to make imprisonment at once effective as a punishment, economical and conducive to reformation. He sketched out a plan for this purpose, under the title of "Panopticon, or the Inspection-house," in 1791. The governor was to be a contractor, who was to have the

prisoners put entirely at his disposal, to work for his profit in any way that he might think most advantageous. He was to be compelled by law to provide them with the bare necessities of life, and also with suitable religious and moral instruction on Sundays, and was to be prohibited from working them on that day, at least in any way which could interfere with that object; his powers of inflicting punishment were to be rather strictly limited, and he was to forfeit so much for every death above a certain average, and every escape. Above all, he was to be prevented from abusing his position by the most absolute publicity; every detail of his management to be regularly published, himself subjected to examination as often as desired, and visitors not only admitted under reasonable regulations, but in every way invited and attracted. In other respects he was to be the autocrat of the establishment; and it was conceived that, with the power of watching them every moment of the day and night, and of granting on his own terms every sort of indulgence consistent with good order and morality, he would have the power, as he would certainly have the will, to extract from each prisoner the utmost amount of exertion, applied in the most useful and economical manner of which he or she was capable. He would thus be at once saving the public money, and accomplishing at least the first step in moral reformation by cultivating a taste for industry, while such a prison life would *seem* terrible in prospect to the idle and vicious, exactly in proportion as they were such.

To this scheme Bentham devoted his best energies from 1787 to 1813. It was taken up at one time by the government of William Pitt, and an Act was actually passed authorising the experiment with Bentham himself as *contractor*. But the undertaking met with every kind of ob-

struction, and at last, after nearly twenty years of alternate hopes and fears, of tedious negotiations, official evasions, and sterile Parliamentary debates, it was effectually extinguished by the adverse report of a Parliamentary Committee, followed by the erection of the present Millbank Penitentiary at a vastly greater expense and on a totally different system.

Transportation.—In the meantime the common gaols were relieved in a makeshift fashion by working gangs of prisoners in hulks at the seaports; but the resource mainly relied on for getting rid of more dangerous criminals was the old one of transportation, Botany Bay having succeeded to America. As at first employed, there was no mistake as to the reality of the punishment; the misfortune was that the worst elements in the real were not so made known as to form any part of the apparent punishment. If the judge, in sentencing the convict, had thought fit to explain, for the warning of would-be offenders, exactly what was going to be done with their associate, the sentence would have been something of this sort: "You shall first be kept, for days or months as it may happen, in a common gaol, or in the hulks, in company with other criminals better or worse than yourself, with nothing to do, and every facility for mutual instruction in wickedness. You shall then be taken on board ship with similar associates of both sexes, crammed down between decks, under such circumstances that about one in ten of you will probably die in the course of the six months' voyage. If you survive the voyage you will either be employed as a slave in some public works, or let out as a slave to some of the few free settlers whom we have induced to go out there. In either case you will be under very little regular inspection, and will have every opportunity of indulging those natural

propensities which have already brought you into this Court ; but as there must be some limits to the apathy of the authorities, while your propensities to mischief will grow by exercise, it is probable that before your term has expired, you will either have been executed for some fresh outrage or have escaped to live the life of an outlaw and a savage in the bush. If not, you will, on the expiration of your sentence, become in name a free man. But as a matter of fact it will make very little difference to you whether I sentence you for seven years, or for fourteen years, or for life. While you remain in the colony you will be subject, in common with all the population, to the uncontrolled despotism of the Governor. If you desire to return home, you have no doubt a legal right to do so, but you will, nevertheless, be forbidden to go ; all ship-masters will be forbidden to give you a passage, and if caught you will be flogged and sent back." What would have been the precise amount of deterrent influence exercised by such a prospect of mingled misery and licence it would be hard to say ; in reality all that was known was that the prisoner went away and did not re-appear. Bentham tried hard to excite a Parliamentary opposition to the system, but in vain.

Procedure and Evidence — Attack on the Lawyers.—Still more extensive were Bentham's labours in this department, and perhaps all the more fruitful in the end, from the very fact that in this case his attention was not diverted to the vicissitudes of any present enterprise. In truth, his method of attack was such as to have scarcely a chance of immediate success, uniting against him as it did the most powerful body of men in the kingdom. Whether he was wise or unwise in proclaiming his discovery in so uncompromising a fashion, we *cannot* wonder that the facts before him, as with dreary

uniformity they emerged from every part of the system which he was led to examine, ended by implanting in his mind the ineradicable conviction that the purpose of the whole was to secure the maximum of profit to the lawyers at the expense of the community; to sell just so much justice as would give tolerable security to the life and property of the most powerful classes; even to them to sell it as dear and of as bad quality as could be done consistently with obtaining any custom at all in a trade of which their fraternity had a monopoly, and to deny it altogether to the rest of the population. Not, of course, that there had ever been any avowed combination for such a purpose; the system had developed itself bit by bit, and at each fresh development the circumstances had been such that the persons to determine whether justice or injustice, cheapness or dearness, simplicity or complication, should be preferred, were the lawyers. The lawyers, on the average, acted on average motives; in each case it so happened that the advantage to themselves, their friends and connections, of a bad arrangement was very near and palpable, while the advantage to the suitors of a good arrangement was a thing which they had no inducement to think about; they acted accordingly generation after generation, and the state of things which he saw before him was the result.

Scheme of Reform.—Describing these things as he saw them, he ensured the hostility of at least one generation of lawyers to anything emanating from him, and that in the very department in which laymen without lawyers are most absolutely helpless. But this very circumstance enabled him to work all the better for the next generation. Hopeless of success in attacking any isolated abuse, he had leisure to work out a complete scheme of procedure, *with reasons so clearly given for every part, that he is*

more instructive when he is wrong than most other men when they are right. The main heads of that scheme were as follows :—

Judicial Establishment.—"The field of distribution to be local, not logical;" in other words, whereas in the existing system there were different Courts for different kinds of cases, and even for different stages in the same case, but only one or a few central Courts of each kind for the whole country, he would have a Court within, at the very least, half a day's journey of every individual, dealing out every kind of justice as required. The Courts to be accessible, like hospitals, every day in the year, and at every hour of the day or night. "Justice only to sleep when injustice sleeps also." Each Court to consist of a single judge, of course with a proper staff of assistants, but singly responsible for every step of the proceedings from beginning to end, and with all necessary powers vested in him for that purpose; his view being that the sense of responsibility is always weakened by its being divided. Juries not to be abolished, but only to be resorted to as an additional security against despotism, class feeling, or corruption, when specially demanded by either party. Judges to be all trained lawyers (as opposed to the county magistrates before described), but trained specially for judicial work, as on the Continent, instead of attaining their position through a course of successful advocacy, as they were and are with us. The correctness of this view depends upon too nice a balance of advantages and disadvantages to be here discussed. Lastly, they were to be paid a regular salary, instead of depending as then on the fees of the suitors; the latter system, as he justly pointed out, giving them a direct interest in the length and costliness of legal proceedings.

The Procedure itself.—Here, it must be owned, that

he started with a principle, the soundness of which has been very reasonably questioned. He delighted to contrast with the technical English system the "natural" procedure of the father of a family. His critics have had no difficulty in pointing out flaws in the comparison; how the father is presumed to be vastly superior, and in no way accountable to the children whom he governs, while the judge is only a citizen exercising a limited and special authority over those who may be in other respects his equals or superiors; how the father's object is to do what is best for the children themselves, whose conduct is in question, while the judge's object is to make the truth as plain to the public as it is to himself, and to act upon it in such a way as will best restore confidence to society at large, the feelings and interests of the prisoner being of quite subordinate concern.

But if his favourite illustration was one which might easily be pressed too far, his actual applications of it were seldom other than judicious. The points he most frequently insisted on were these:—The aggrieved party to make his original application to the judge in person and in public, who should with the same publicity advise him as to the course to be pursued. No trouble of any kind to be caused to the person complained against until *prima facie* grounds have been shown for believing that something is due from him. When that is shown, the parties to be confronted as speedily as possible with each other in presence of the judge, the document which summons the defendant being framed so as to give him sufficient information to enable him to prepare a defence. Personal detention only to be resorted to when absolutely necessary, as in a serious criminal charge. For ascertaining the points at issue, the ordinary method to be oral discussion in presence of the judge; written pleadings to be the ex-

ception, not the rule. Professional assistance to be allowed on both sides, but by no means to exclude direct communication between the judge and the parties.

Rules of Evidence.—General rule: testimony, wherever possible, to be given orally in open court, the witness being freely questioned by the parties or their counsel, by the judge, or even by any stranger with leave of the judge. No testimony to be given upon oath; but all falsehoods uttered or written for a judicial purpose, whether in or out of court, whether in the preliminary pleadings of the parties, or at the final hearing, to be severely punished. No witnesses to be excluded or excused from giving testimony; not the accused in a criminal charge, or the parties in a civil suit, for they are the very persons who ought to know most about the matter, and if they are under strong temptation to speak falsely, it is the business of the judge to overcome that temptation by the fear of punishment, to remove it by rendering falsehood useless through skilful examination, or to allow for it in drawing his conclusions; not persons having an interest in the result of the trial, for the same reason; not persons convicted of crime, or of bad repute; not persons professing erroneous religious beliefs, or none at all, for if their misbelief made them liars, they could evade the tests by professing orthodox opinions. No *kind* of testimony to be excluded or permitted to be withheld. Not answers to questions imputing crime to the witness; not confidential communications between husband and wife, for it is not (so Bentham thought) in the interest of justice to encourage any confidence whatever between wrongdoers as such; not communications between an accused person or a party to the suit and his legal adviser, for to compel such disclosures would be the best means of preventing lawyers from lending their services to *schemes* of injustice; not even such testimony as in

English law is termed *hearsay*, since it might throw some light on the subject, and could do no harm if the judge were competent to distinguish relevant matter from irrelevant. The only exclusions which Bentham would admit were those in which the vexation or expense caused by eliciting the evidence would counterbalance the advantage to be gained by a right decision of the question at issue; as if a witness were to be summoned from the East Indies, or asked for disclosures which might enable a rival to ruin him in his trade, for the sake of a question of five shillings.

Costs.—Bentham anticipated that by these reforms the expense of legal proceedings would be reduced within comparatively narrow limits. For any costs occasioned by an unfounded demand, or unfounded resistance, or by improper proceedings on either side, he would require the party in fault to pay,—not necessarily the full amount, but a sufficient amount, in proportion to his means, to deter other litigants from offending in like manner; and the same in a criminal case; but all costs not so provided for ought, he considered, to be borne by the public treasury rather than by an innocent party. His reasoning was this: Every action or prosecution which is justly undertaken is a blow struck in defence of the whole community. By the fear of consequences thus inspired, other would-be wrongdoers are restrained, and quiet people enjoy their rights in comparative security, without any exertion of their own. Or, to put it in another way, the fact of legal proceedings being necessary at all is a proof that the protection which the State undertakes to give to its members is so far incomplete, and the State owes compensation for its failure.

Law-Taxes.—If it was just, in his view, to tax the community for the benefit of litigants, the reader will not need

to be told what he thought of taxes imposed specially on litigants for general public purposes, in relief of the rest of the community. In one of the most popular of his writings, he urges that a law-tax is worse even than a bread-tax or a poll-tax, because it is a tax upon distress; a tax upon one of the first necessities of life, which falls upon a man exactly at the moment when he has just been robbed. Quoting the sentence in Magna Charta, "we will sell to no man, we will deny to no man, justice or right," he asserts that justice is denied to nine-tenths of the people, and sold to the remaining tenth at an unconscionable price.

CHAPTER III.

EARLY ATTEMPTS AT LAW REFORM.

The Period of Stagnation.—We have now surveyed, though very superficially, the whole, so far as relates to law reform, of the vast programme which Bentham laid before his countrymen. More than this it was not, for the most part, given him to do. From the time when he first began to examine the law as expounded by Blackstone in 1763, to within a few years of his death, the total amount of change in the law was very inconsiderable, and such changes as were made were, as often as not, in the wrong direction. During the first forty years of the reign of George III. it would be hard to point out a single statute, within the domain of private law, which with our present lights we can unhesitatingly set down as an improvement; very few indeed of which it can be said that they were even honestly intended by their authors to promote the well-being of the people at large as distinguished from the immediate interest of the Government of the day, or, at most, of the limited class which alone had an appreciable share of political power. In the latter category we may place Blackstone's abortive attempt for the improvement of prisons; and we may give the same credit for good intentions to an Act of 1779, which purported to be an important concession to the principle of religious liberty, and which in fact allowed a Dissenting minister

Blackstone. His successors carried on the work with slackening momentum down to the end of the eighteenth century. For the next twenty years a different work was reserved, to be accomplished by a very different workman. Lord Eldon, who held the seals almost uninterruptedly during that period, was nicknamed by Bentham *The Lord of Doubts*; and in truth the enormous length of time during which suitors had to wait for his decisions caused such wide-spread misery as would have made the post intolerable to a man of more feeling and imagination, but will seem natural and almost justifiable if we remember that he was in reality legislating as well as adjudicating. In his hands Equity ceased to be an innovating agency, arbitrarily interfering with the regular course of the Common Law in the name of a higher moral code, and settled down as a regular part of the system, as strictly bound by precedent, and as little influenced by appeals to abstract morality as the Common Law itself.

Fox's Libel Act.—In other respects the darkness thickens rather than brightens as we approach the close of the last and the commencement of the present century. The reason is not far to seek. The French Revolution, and the wars which grew out of it, either converted into furious reactionists those who might otherwise have been reformers, or reduced them to silent despair, or turned their thoughts towards organic constitutional changes, hardly to be effected without violence. Such legislation as there was in those days was almost wholly for the worse. New capital offences were added to that list by which even Blackstone had been shocked. In respect of sedition, conspiracy, and libel, the laws can hardly be said to have been altered, for in truth there never had been any such laws beyond a sort of understanding that a judge and jury between them might punish, under one or other of

these names, any conduct which they might consider injurious to the public interest. The alteration was not in the law, but in the spirit in which this power was exercised. The Pitt Government set itself to suppress, through the legal tribunals, every species of political discussion. When judge and jury were agreed, as in the first panic provoked by the French excesses they generally were, there was no difficulty whatever in straining the law, or rather in making a law so as to accomplish their purpose. Thus a respectable attorney, who ventured to say in a coffee-house that he was in favour of having no king, and that the constitution of this country was a bad one, was found guilty of sedition, and sentenced to six months imprisonment, to stand in the pillory, and to be turned out of his profession. Only when judge and jury differed, as they began to do pretty frequently when the panic had a little subsided, was there any difficulty. The judges insisted that it was for them to say what state of facts would constitute the legal offence, and for the jury merely to determine whether such facts had occurred. The general principle was undeniable; but as applied to cases where there was notoriously no law in existence, so that the most learned of judges could not possibly know more about the matter than the most ignorant of juries, it is not surprising that it should have seemed very like a principle of arbitrary power, and that juries should have become somewhat restive under it. The knot was cut with that entire disregard of consistency which is supposed to denote a practical spirit, by Mr Fox's Libel Act of 1792. That Act, professing to *declare* the existing law, which it was certainly *either* creating for the first time or reversing, left the jury free to accept or reject the opinion of the judge as to what constituted a libel, while in other cases of sedi-

tion, and in cases of conspiracy, the judge remained as arbitrary as before.

Law of Treason.—About the same time the law of treason was furbished up and put into working order, if not exactly intensified in severity. To intensify the punishment, indeed, was scarcely possible, and perhaps even then the judges would have shrunk from the duty of pronouncing sentence, had not the worst accessories, the cutting down alive and disembowelling, been abolished by statute (1790), leaving, however, the beheading, drawing, and quartering still on the statute-book, though even these were never again actually practised. The corresponding sentence on women, viz., to be burnt alive, was formally abolished at the same time. The most practically important part of it, that relating to offences against the state rather than the person of the sovereign, was as we have seen almost entirely judge-made, being developed out of the old statute of Edward III. in a way which set the ordinary rules of construction at defiance. It being found by experience that juries had their faith sorely tried by these displays of ingenuity, the “constructive treasons” were all incorporated in a new Act of Parliament, passed at first as a temporary law, and afterwards made perpetual.

Sir S. Romilly.—Before we have travelled far into the present century, we find the gloom relieved by efforts towards improvement which are not the less admirable because the positive results were but scanty. From 1806 to 1818, among the many successful barristers who then, as now, found it possible to combine an extensive practice with the position, and sometimes with the duties, of a member of Parliament, there was one, at least, who had sought the position for the sake of the duties, and not the

duties for the sake of the position, and who conceived the primary duty of a legislator, especially a legislator who is also a lawyer, to be the amendment of the law. He was an intimate friend and admirer of Bentham, and in full agreement with him as to the principles of law reform, though he did not, like him, look to a radical change in the Constitution as the only means of giving effect to them, and preferred to try what could be done by dint of tact and perseverance with the existing Parliament. His own practice was chiefly in the Chancery Courts, but his efforts were mainly, though not exclusively, directed to the improvement of the criminal law, by mitigating the severity of punishment while increasing its certainty. It seems to be universally admitted that he did all which it was possible for a man to do; he had almost every conceivable qualification for the task—legal knowledge, tact, eloquence, perseverance, a stainless reputation, and a disposition which won the regard even of his opponents; and he certainly never spared himself in the cause. He had also, at the commencement of his undertaking, three coadjutors only a little inferior to himself,—Horner, Whitbread, and Wilberforce. With all these advantages and these exertions, the following account of what was accomplished in twelve years, compared with the reforms which will be found to mark the career of far inferior men at a later period, will afford a very fair measure of the power of *vis inertiae* in the days of the Regency.

Slight Improvements in Penal Law, &c.—The punishment of death taken away from three of the least criminal of the 200 or more offences to which by various statutes it was attached, viz., privately stealing from the person, stealing clothes from bleaching-grounds, and the offence of soldiers and mariners begging and wandering without a pass.

The punishment of the pillory abolished for all offences, except perjury and subornation of perjury.

An improvement in the remedy by Habeas Corpus for wrongful imprisonment unconnected with any criminal charge.

Partial repeal of the law forbidding workmen to practise a trade without seven years' apprenticeship.

Two slight alterations in the bankruptcy laws, and a more summary remedy for abuses in charitable trusts.

An Act, not very wisely framed, for protecting the health and morals of boys and girls employed in cotton-mills and factories, but nowhere else, as though the same abuses were not certain to be found, if looked for, in every trade where greedy employers were brought in contact with needy parents.

Dissenting Ministers and Unitarians.—To these we should add two measures affecting Protestant dissenters which did not originate with Romilly. In 1812 dissenting ministers officiating in a certified place of worship were relieved from the penalties of the "Conventicle Act" without the onerous conditions imposed by the Toleration Act, while, at the same time, uncertified public worship and preaching were more tightly restrained than before. In 1813 the sect of Unitarian Christians were relieved from the penalties imposed for denying the Trinity, leaving the law against the denial of Christianity, or of the Divine authority of the Old and New Testament, still in force, as it nominally is to this day.

Vice-Chancellor of England.—The creation of a new Chancery judge, with the title of Vice-Chancellor of England, being proposed by Lord Eldon and opposed by Sir S. Romilly, bears with it a strong suspicion of being a *job* rather than an improvement; but it seems, nevertheless to have been beneficial, though not touching the

principal causes of delays in Chancery. A proposal to make shop-lifting to the extent of 40s. no longer capital was brought forward, but lost; as was also a bill to make the real property of a deceased person generally chargeable with his simple contract debts.

Reforms after the Death of Romilly.—Romilly died in 1818, and two of his coadjutors, Horner and Whitbread, had died before him; but his work was carried on by Sir James Mackintosh, who in 1820 procured the removal of a few more items from the list of capital offences, and also the complete exemption of women from the punishment of whipping, either public or private. In 1823 a slight inroad was made on the pernicious system of threatening punishments which were never meant to be inflicted, though only by substituting one farce for another, it being enacted that in clergyable felonies sentence of death should no longer be pronounced in Court, but only recorded. In the same year was abolished the practice of burying a suicide at the meeting of four cross roads with a stake through his body,—the “punishment” of the dead man being thenceforth limited to simple burial at night in unconsecrated ground, and without any of the rites of the Christian religion.

Trades' Unions.—In other parts of the law the decade which followed the peace of 1815 was somewhat better than the decade which preceded it. We observe the removal of a few of the most vexatious restrictions on commerce and labour. The early efforts in favour of free trade were principally due to Mr Huskisson as their immediate author, the original motive power coming from the writings of Adam Smith, who stands in much the same relation to the science of political economy as that in which Bentham stands to that of jurisprudence. As it is

to the former science that those matters more especially belong, a mere passing reference to them will here be sufficient. The laws relating to labour belong to both sciences, but rather more to jurisprudence than to political economy. It is, therefore, proper to note a statute passed in 1825, repealing the previous judge-made law, under which a mere agreement among workmen to abstain from work in order to extort higher wages, or peaceable persuasion for that purpose, was punished as "conspiracy," but leaving it still open to a judge to define "threat" and "intimidation" in any way he thought proper, and to apply the law of conspiracy to any Acts coming within his own definition. From this date the trades' unions have been continually increasing in importance as a feature in our social organisation.

Law Taxes.—About the same time the improved state of the national finances, as the great war receded more and more into the distance, did what thirty years of argument and invective had failed to do, in bringing about the repeal of these encouragements to injustice—leaving untouched, however, the at least equally obnoxious stamp-duties on the legal documents which are framed to prevent litigation.

Appeal and Trial by Battel.—As, in 1797, the Thelluson Act had called attention to an oversight in our property laws, so in 1818 a still more startling incident displayed, and led to the removal of, a strange survival from the dark ages in our criminal jurisprudence. In the case of *Ashford v. Thornton*, an *appeal of murder* (p. 111) was brought against a Warwickshire labourer by the brother and heir of a poor girl whose body had been found in a pond under suspicious circumstances.¹ The appellee was

¹ The appeal itself is here given, as serving to illustrate what was said above as to the particularity required in indictments. The parts

thereupon advised, that instead of the ordinary trial by jury, he might claim the ancient *trial by battel*, and accordingly threw down his glove on the floor of the court in token of defiance. After a long and learned argument it was decided, that unless the evidence against the accused was so strong as to amount to absolute demonstration, his claim could not be refused. The appellor declined the combat, being physically no match for his antagonist, who was accordingly discharged. To prevent the recurrence of such a scandal, a short Act was passed in the following

in brackets are peculiar to appeals. "In the King's Bench, Michaelmas Term, 58 G. III. [Abraham Thornton was attached to answer W. Ashford, who was the eldest brother and is the heir of Mary Ashford deceased, of the death of the said Mary Ashford, and thereupon the said W. Ashford in his own proper person appealeth Abraham Thornton, &c.] For that he, the said A. T., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 27th day of May, in the 57th year of the reign of our sovereign lord George the Third, by the grace of God, &c., with force of arms, at the parish of Sutton Coldfield, in the county of Warwick, in and upon the said M. A., spinster, in the peace of God and our said lord the king, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Abraham Thornton then and there, feloniously and wilfully, and of his malice aforethought, did take the said M. A. into both his hands, and did, then and there, feloniously, wilfully, violently, and of his malice aforethought, cast, throw, and push the said M. A. into a certain pit of water, wherein there was then a great quantity of water, situate in the parish of Sutton Coldfield aforesaid, in the county aforesaid, by means of which said casting, throwing, and pushing of the said M. A. into the pit of water aforesaid, by the said A. T. in form aforesaid, she, the said M. A., in the pit of water aforesaid, with the water aforesaid, was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning she the said M. A. then and there instantly died. And so the said A. T. her the said M. A. in manner and form aforesaid, feloniously and wilfully, and of his malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity. [And if the said A. T. will deny the felony and murder aforesaid, as aforesaid charged upon him, then the said W. A., who was the eldest brother and is the heir of the said M. A. deceased, is ready to prove the said felony and murder against him, the said A. T., according as the court here shall consider thereof, and hath found pledges to prosecute his appeal." Witness, WILLIAM ASHFORD, his X mark.]

year, entirely abolishing both private appeals and trial by battel.

The "Six Acts."—Against the above-mentioned improvements we must set a series of repressive measures passed in 1819, the year of the unfortunate collision between the yeomanry and the people, sometimes known as the "Manchester massacre." Of these the first prohibited assemblies for military exercises; the second authorised the magistrates to search for and seize arms in sixteen specified counties; the third was no doubt intended to facilitate the enforcement of the others, but was in itself an apparently harmless measure for expediting trials for misdemeanors; the fourth seriously restricted the freedom of holding public meetings, and required rooms for lectures and discussions to be licensed by two magistrates; the fifth increased the severity of the punishment for seditious or blasphemous libel; the sixth required the publishers of newspapers to give security beforehand for any fines they might incur for such offences, and extended to cheap pamphlets the duties already imposed upon newspapers. Of these Acts, however, the second and fourth were only temporary; the permanently mischievous ones were the fifth and sixth.

Influence of Bentham.—During all this time Bentham was absolutely unknown to the mass of his countrymen. To the moderately wide class of readers who took an intelligent interest in politics and legislation, he was known as "a gentleman who wrote bad English and delighted in paradox." It was only a discerning few who knew him for what he was, studied his works with avidity, and looked up to him as a master, at the same time that they took care not to imitate either the eccentricities of his style or his outspoken, certainly impolitic, and perhaps *unjust* condemnation of whole classes and professions.

Thus, through Parliamentary speeches and a host of pamphlets, reviews, and magazine articles, Benthamism began to insinuate itself by driblets into the national mind, while very few knew the source from which it was derived. The presence of this new element is as unmistakable, though of course not so prominent, in the writings of Sydney Smith and Macaulay, of whom the former came very slightly, the latter perhaps not at all, into personal contact with Bentham, as in those of such professed disciples as James Mill and Albany Fonblanque.

Close of the Period of Stagnation.—A gifted writer dates the commencement of a new era of hope and progress for England from the year 1821, when Parliamentary Reform was first put prominently forward by enlightened and responsible leaders as the object to be striven for, through which all other reforms might in time be secured. With the rise, progress, and ultimate triumph of that agitation, and with the simultaneous agitations for the political emancipation of Protestant dissenters and Roman Catholics, we are here only so far concerned as they affected the condition of our private law. It is certain that as we approach the crisis of the main struggle, the pace of reform in these matters also is distinctly accelerated; the five or six years previous to 1832, though less full of legislative activity than the subsequent half decade, or indeed than any average year which has since elapsed, seem nevertheless on the whole to belong more to the period of advance than to that of stagnation. It will, therefore, be convenient at this point to alter the plan of our narrative, and to group the legal changes since 1825 according to subjects, instead of noticing each in chronological sequence. The arrangement will be the same as that followed in the first part of this work.

Death of Bentham.—As this arrangement will leave

no room for biographical details, we must here take formal leave of the principal hero of our story. Bentham lived on in his industrious and cheerful retirement, watching eagerly the progress of reform, and rejoicing in the steadily increasing influence of his writings, to the age of 83. He lived to congratulate one disciple, O'Connell, on the Catholic emancipation, and to criticise the elaborate and much-applauded, but to him unsatisfactory speech by which another disciple, Brougham, commended the reform of the Common Law Courts to the attention of Parliament. He all but lived to see the struggle for Parliamentary Reform, which had brought the country to the verge of civil war, decided in accordance with the popular wish, and a very substantial, perhaps a preponderating, share in the law-making power transferred from the aristocracy to the middle ranks of society. During the turbid and anxious summer which preceded the consummation of this event, so profoundly changing the conditions of all the legislative problems to which his life had been devoted, that life was reaching a close in beautiful consistency with its whole tenor. "His head," says his faithful friend, the late Sir John Bowring, "reposed on my bosom. It was an imperceptible dying. He became gradually colder, and his muscular powers were deprived of action. After he had ceased to speak, he smiled and grasped my hand. He looked at me affectionately, and closed his eyes. There was no struggle, no suffering; life faded into death as the twilight blends the day with darkness." His last thoughts were active about the best way of minimising the pain to those about him. Henceforth we shall have much to say of Benthamism, but nothing more of Bentham himself.

PART III.

Legal Changes since 1825.

CHAPTER I.

CHANGES IN THE FORM OF THE LAW.

General Remarks.—All the different methods of legislation described in the first part of this work have continued to be employed down to the present day. The amount of new law, both judge-made and statutory, which has been produced year by year, with, on the whole, increasing rapidity, must have rendered the mass utterly unmanageable by this time, had nothing been done to cut away dead matter and to introduce greater order and compactness of form. What has hitherto been done in this way is very far indeed from realising Blackstone's Utopian fancy that "every man may know the law;" still it is better than nothing, as we shall see.

There are three stages or degrees in the process of reducing legislative chaos into order, which are generally distinguished as—

1. Consolidation
2. Digesting.
3. Codification.

Consolidation.—This term is applied to statute law only, and usually to some one branch of it. Consolidation pure and simple is where all the sections bearing on

the given subject are picked out of statutes passed at different times, and placed in juxtaposition just as they are, without dovetailing or curtailment of repetitions, or any alteration whatever.

Digesting.—By this we mean a similar operation performed upon the whole law, statute and judiciary alike, which is arranged under appropriate titles, alphabetically or otherwise, each heading containing sections of statutes mixed up with short summaries, called "*head-notes*," of decided cases.

Codification.—This term, at least as used by modern theoretical writers, means nothing short of a complete recasting of the whole law into a series of clear and succinct propositions, systematically classified according to subjects, using the same words throughout in the same sense, as though all were a simultaneous emanation from a single mind.

Of these three processes the last has never yet been applied, in its fullest sense, to the laws of any nation in the world. The Emperor Justinian "digested" the whole of the Roman law, but codified none of it; and all modern so-called codes are either mere digests or else codifications of certain branches of the law, without reference to the other branches. In England the only process which has hitherto been actually applied by authority is that of consolidation, accompanied by a modicum of amendment and adjustment, and that only to a comparatively small part of the statute law. It has at no time been found possible to consolidate statutes framed at different times and couched sometimes in quite different phraseology, without at the same time altering them in some degree, though the framers of such Acts were usually disposed to confine their amendments within *the narrowest* limits for fear of provoking an opposition.

in Parliament which might prevent or delay the passing of the bills.

Criminal Law Consolidation.—This, the largest undertaking of the kind, was the first to be commenced, though not the first accomplished. In 1827 two Acts were passed at the instance of Sir Robert (then Mr Secretary) Peel, for consolidating and amending the laws relating respectively to larceny and to malicious injuries to property. In 1828 a similar Act was passed with respect to offences against the person; in 1830 and 1831 two more relating to forgery and coinage offences respectively, and several others of slighter importance were passed about the same time. This first series, known as *Peel's Acts*, was far from satisfying the requirements of reformers flushed with the great victory of 1832, and in 1833 a set of commissioners were appointed "to digest into one statute all the statutes and enactments touching crimes, and the trial and punishment thereof, and also to digest into one other statute all the provisions of the common or unwritten law touching the same," and also to inquire and report generally on the best mode of consolidating and digesting the law. Successive commissions were issued in 1836, 1837, 1845, 1848, and 1849, mostly to the same commissioners, but with the very important exception of the celebrated jurist Mr Austin, who withdrew early from the commission, under the conviction that no real good would be done without much more fundamental reforms than his colleagues were prepared, or indeed authorised to consider. In 1853 several bills were prepared in accordance with the recommendations of the commissioners, but were afterwards abandoned; but a new commission, appointed in 1854, and continued during the following years, resulted at last in the production of the six Consolidation Acts of 1861. A perusal

of these Acts will probably satisfy the reader that Austin was at least not wrong in supposing that only a very imperfect result could be looked for under the prescribed conditions. To begin with, the criminal statute law includes an immense number of scattered enactments which it would have been absurd to consolidate separately from their context, since every statute, whether its primary subject be contract, property, procedure, or anything else, must necessarily either express or imply that disobedience carried beyond a certain point will be treated as a crime, to which a penalty of some kind will be attached. But even among ordinary crimes there were several which, having been defined wholly or chiefly by judge-made and not by statute law, altogether escaped the process of consolidation. Treason, seditious libel, conspiracy, and perjury were among the number. A more serious drawback from the completeness of the scheme was that most of the elementary definitions of crimes were to be found, not in the statute law, but in the common or judiciary law, to which their commission did not extend. Thus the first of these acts begins by stating the punishment for *murder*; but what murder is, there is nothing to indicate from beginning to end. The reader is tacitly referred to the series of judicial decisions out of which something like a definition has been slowly evolved. The same, or worse, is the case with regard to larceny. It also results from this want of definitions, or indeed from the very nature of consolidation, as opposed to codification, that each statute presents the most wearisome repetition of similar prohibitions and penalties, differing only in the subject-matter to which they relate. We shall gain a very fair notion of the composition if we imagine the tenth commandment of the Decalogue split up into as many distinct prohibitions as there are things to be

coveted: one for the neighbour's wife, another for his house, another for his ox, and so forth, the list immensely enlarged, and a full-length description of the punishment—generally the same, or nearly so—attached to each prohibition.

Other Consolidations.—In the thirty years and more which elapsed between the commencement and the completion of the last-mentioned undertaking, numerous smaller operations of the same kind were performed upon other branches of the law. Of these the most considerable were the Bankruptcy Consolidation Act of 1849, the Merchant Shipping Act of 1854, and the consolidation of such sanitary laws as were then in existence by the Diseases Prevention Act of 1855. All of these have since been superseded by later enactments of an equally comprehensive character. Other consolidating statutes have been passed since 1860, but by no means on a sufficiently large scale to overtake the annual growth of small, special, and tinkering Acts which constitute the bulk of each new volume of the statute book.

Lands Clauses Act, &c.—A somewhat different type of consolidation is exemplified by three remarkable Acts passed in 1845, the purpose of which was not merely to collect the existing enactments on a particular subject into a single statute, but to transfer a vast amount of matter from the domain of "local and personal" to that of "public and general" legislation. Ever since the virtual transfer of executive power from the Crown to the Parliament, no small part of the work of every session has consisted of what is called private bill legislation, that is to say, conferring special rights, or imposing special duties, in addition to, or in derogation from, the general law of the realm,—doing, in fact, what was formerly done by royal charters and letters patent. Of the applications for

the exercise of this executive and dispensing power of Parliament, about the most frequent and important were those on the part of (1) individuals wanting to form themselves into 'a corporation, and to be considered for legal purposes as constituting collectively but a single person; (2) individuals or public bodies contemplating some undertaking which was expected to conduce to the public benefit, but which could not be carried out without some interference with rights of private property. With the invention of railways and the immense extension of commercial enterprise which took place as soon as the country had fairly recovered from the great French war, applications of both classes naturally became vastly more frequent than before. As to each class, it was found that the provisions required were to a large extent the same in every case, and that a great saving of time and expense might be effected by embodying all such provisions in a single statute passed once for all, and then simply incorporating them, by reference, with each of the special Acts that were passed from time to time. The principal statutes passed with this object were, *The Companies Clauses Consolidation Act, 1845*; *The Lands Clauses Consolidation Act, 1845*; and *The Railways Clauses Consolidation Act, 1845*. Each of these Acts has naturally been added to by subsequent Acts, as experience showed other clauses to be equally universal or common in similar transactions.

Act for shortening Conveyances.—In the same year, 1845, the same principle was applied to private legal instruments, whose inordinate length and cumbrousness of form, as drawn by professional conveyancers, had long been a favourite topic for ridicule and invective. It being found that in such and such contracts such and such conditions were usually inserted, an Act was passed

enacting that they should always be taken for granted unless the contrary should be expressly declared by the parties. In other words, if you make a contract of a certain kind in general terms, the law will fill in the details for you, unless you object. The same process has been largely applied since 1845, and might doubtless be carried still further with advantage. It must, however, be admitted that any abbreviation of legal instruments which can be effected in this way by the legislator will still leave an immense amount of verbiage which is simply due to the inveterate habits of the conveyancing profession, and with which the law can do nothing,—unless, indeed, it were to prohibit the present mode of payment according to the number of words. “If,” says Mr Symonds, “a man would, according to law, give to another an orange, instead of saying, ‘I give you that orange,’ the phrase would run thus:—‘I give you all and singular my estate and interest, right, title, claim, demand of and in that orange, with all its rind, skin, juice, pulp, and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I the said A. B. am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinbefore or hereinafter, or in any other deed or deeds, instrument or instruments, of what nature or kind soever, to the contrary in anywise notwithstanding,’ with much more to the same effect.”

Language of Acts of Parliament.—The conveyancers, indeed, might have retorted the charge upon the Legislature; and in this, as in many other matters, no legislative remedy was likely to be so effective as a good example set in the highest quarter. The statutes

were, as we have seen, infested with all, and more than all, the faults of composition observable in private instruments; and if it must in justice be admitted that the difficulty was greatly increased by the necessity of satisfying two numerous assemblies, it must be said, on the other hand, that Parliament was at least supposed to be the master, while the private conveyancer was the servant, of the judge with whom it rested to give effect to their respective productions.

Mr Symonds.—Bentham had, of course, been fully alive to the importance of this subject, for which, indeed, he invented a name—Nomography; but though his views on it were set forth incidentally in many passages of his published works, the papers more especially devoted to it, composed at various dates between 1811 and 1831, only saw the light for the first time in the collected edition of his works published in 1843. In the meantime it was worked in a very practical way by Mr Arthur Symonds, the author above quoted (p. 177), who in 1835 published a most instructive treatise on “The Mechanics of Lawmaking;” and in 1838 produced a plan for the general amendment of the system, which was laid before Parliament by command of Her Majesty. Of the improvements most strongly urged by him, so far as they related to the mere composition of the laws, the first was naturally the omission of words purely superfluous; he filled ten pages at the end of his little book with a glossary of such words commonly inserted in statutes, besides pointing out the immense saving to be effected by the employment of general words in place of the usual tedious enumeration of particulars. Other suggestions were—

That, instead of one long descriptive title, there should be—(1), a short title, or name, by which the Act could be cited for all legal purposes; (2), a fuller descriptive title;

(3), an analysis or table of contents; (4), an alphabetical index. That preambles should, as a rule, be omitted, but when employed at all, should state fully and truthfully the reason of the law. That the expression of the enacting power should be employed once for all at the beginning, instead of repeating "and be it further enacted, by the authority aforesaid," at the commencement of each section,—a practice which was, in fact, a relic of the theory that an Act should be read as it was still actually written in its only authoritative form, as one gigantic unpunctuated sentence. That the essential provisions of the Act should be placed at the beginning, and clearly separated from collateral and ancillary matters; and generally, that the Act should be broken up into as many divisions and subdivisions as would promote perspicuity.

Effect of his Suggestions.—No immediate result seems to have followed, but in 1846 a short Act was passed through both Houses almost without observation, which gave to the statutes as printed with numbered sections, stops, &c., the authority which had hitherto belonged only to the venerable, but unreadable statute roll, abolished the repetition of the enacting words, and provided that "in all Acts, words importing the masculine gender should be deemed to include females, the singular to include the plural, and the plural the singular, unless the contrary as to number or gender were expressly provided; besides defining the words 'month,' 'land,' and 'oath,' whose ambiguity required continual explanation." It also abolished the perhaps logical but certainly inconvenient rule, that if an Act repealing a former Act were itself repealed, the original Act was thereby revived.

About the same time *short titles* began to be employed, and are now common, though still not universal. We can now refer, in legal instruments as well as in common con-

version, to "The Married Women's Property Act, 1870," instead of saying either "33 and 34 Vict. c. 93," or "The Act to amend the law relating to the property of Married Women."

Codification.—Consolidation of scattered statutes, and improvements in their arrangement, composition, and typography, could do little more than whet the appetite of reformers for something more comprehensive, and the cry for "Codification" has never entirely died out from that time to this; but neither has it ever acquired volume and strength enough to overcome the really formidable obstacles which stand in the way of its satisfaction. In truth, the obstacles were and are of such a nature, that it may naturally be doubted whether a "cry" is exactly the most appropriate agency for removing them. It seems at first sight a little like getting up a popular agitation for a great national epic poem. A code, in the fullest sense of the word, would be a work of high literary art. It must, in the main, be the production of a single master-mind, possessing a very rare combination of qualities, though it would not, like a poem, depend entirely on his unassisted genius, but would admit of and require the services of many humbler coadjutors. One may almost venture to prophesy, that if we ever have such a code, it will be produced first as a private literary undertaking, which will so attract and charm the reading part of the nation, that they will cry aloud not for *a* code, but for "*the* code, the whole code, and nothing but the code;" and will obtain, as usual, something bearing a general resemblance to what they asked for, though more or less mangled and distorted in the course of the struggle.

Foreign Codes.—Such a code, we have already said, does not yet exist in any known country of the world; but there are degrees in codification as in other things,

and examples have not been wanting of considerably larger efforts in this direction elsewhere than any which have been made in this country. Even before the French Revolution, Denmark, Sweden, Prussia, and Sardinia had provided themselves with codes of some kind; but the Prussian, at all events, which is the most celebrated of them, is acknowledged to be full of faults, and does not even pretend to completeness. Then comes the still more celebrated Code Napoléon, begun under the First Republic, completed under the First Empire. It served its main purpose well in France, by ridding that country of a vast and discordant mass of heterogeneous local and customary laws, and cementing its political unity; and, having been extended during the temporary predominance of the French arms over a great part of Europe, it was either retained or imitated by several of the subjugated nations after their liberation. But as a code, the distance which separates it from anything which would really deserve the name, is sufficiently demonstrated by the fact that it has been found impossible to apply it in practice without constant reference to the authorities on which it is founded; as these are, of course, only accessible to the learned, its brevity and simplicity are merely superficial and delusive.

American and Anglo-Indian Codes.—More interesting to us are the modern experiments which have shown that English law is not less amenable to systematic treatment than the "Rome-bred" jurisprudence of the continent. In America, the State of New York lately ordered the whole of its law to be collected in five distinct codes, all of which were duly completed, but only two of which were confirmed by the Legislature. It may be conjectured that the cause of the rejection of the three others was the too free use by the commissioners of the liberty accorded to them of suggesting alterations of substance as

well as of form. About the same time efforts of a more thorough and scientific character were being made by our own countrymen to give to their Indian fellow-subjects the essence of English law, in a form in which it might be administered by magistrates of ordinary industry and ability, without whole libraries at their elbows, and without the enormously expensive assistance of English barristers—might, in short, be a blessing instead of an intolerable curse. As early as 1830 commissioners were appointed, of whom Lord Macaulay was one, to deal with the criminal part of the law, which appeared to be at once the easiest and of the most pressing importance. By their labours was produced, in 1837, what Sir H. Maine calls “that admirable Penal Code, which was not the least achievement of Lord Macaulay’s genius, and which is undoubtedly destined to serve some day as a model for the criminal law of England.” Owing to some hitch or other it did not become law till 1860, since which time it seems to have given almost universal satisfaction, and has been but very slightly amended. Of course it is continually being overlaid with a new growth of law, in the shape of judicial decisions, which may or may not be ultimately in some way incorporated with it; but these being genuine interpretations, not innovations in disguise, do not in any way prevent the code itself from being an intelligible guide of conduct to the general public who simply read it as it stands. This first successful experiment has been followed by five other statutes, each dealing systematically with some large branch of the law, viz., the Succession Act, the Contract Act, the Evidence Act, and the Codes of Civil and Criminal Procedure; leaving no parts unsystematised of the laws in force in British India, except those relating to civil injuries and to special classes of persons, and the peculiar family laws reserved to Hindoos and Mohammedans respectively.

Austin.—The same year, 1860, which saw in India the greatest triumph which the cause of codification has yet gained, is marked in English legal history by the death of John Austin, the man who was, especially in all that relates to the formal expression of law, by far the worthiest successor of Bentham who had then appeared, and who might, under happier circumstances, have been known as the successful codifier of English law. But delicate health and constitutionally low spirits—very different from the easy temper, and cheerful, indomitable self-confidence of his predecessor—had conspired, with the neglect of his busy “practical” contemporaries, to drive him out of the field, when his work was as yet little more than begun; and he could never, during the later years of his life, rouse himself sufficiently even to publish a fresh edition of his lectures on “The Province of Jurisprudence,” which had appeared in 1832, much less to complete the work to which those lectures were intended to be merely introductory. He left, however, a mass of papers behind him, which were collected and given to the world in 1863 by his noble-minded and talented widow, and which, even in their fragmentary and uncouth condition, may claim to have suggested nearly all that has since been thought and said by English jurists on the subjects to which they relate. The touching preface, in which the story of his life is told by Mrs Austin, now meets the eye of nearly every young law-student at some period of his career, and can hardly fail to have awakened many noble aspirations, from which the science of jurisprudence has reaped some benefit already, and must surely reap much more in the future. The whole of the work in question is virtually a contribution towards the formation of a code, inasmuch as the author’s principle is to form a scientific language in which such a code might be expressed,

and a scientific classification of the subjects which would have to be comprised in it; but it also contains an elaborate essay and many scattered notes expressly dealing with the question whether codification is possible or desirable, and if so how it should be done. The views above expressed on the subject are in the main his; but the strong doubt which he felt as to the existence, then and there, of men at once competent and willing to undertake the task, led him to recommend commencing with a digest, and postponing the code till a better system of legal education, and the use of the digest itself, should have produced a superior race of jurists. Whether he would have approved of the particular mode in which this suggestion of his was acted upon, may well be doubted.

The Digest Commission.—It was in that same year 1863, that the question passed out of the domain of mere speculation into that of actual politics through an elaborate speech addressed by Lord Westbury to the House of Lords. No immediate action followed upon this, but in 1866 a Royal Commission was appointed, which reported in 1867 that a "digest" (using the term nearly as above defined) would be very beneficial in itself, and would afford the best preparation for a code, if that should ultimately be resolved upon; but that, as it would be an undertaking involving great expense, an experiment should first be made upon some small portion of the law. Accordingly, members of the legal profession were invited to send in specimens of digests of the English law on three specified subjects, on the understanding that the successful competitors would be employed in the preparation of a general digest, should such a work be undertaken. Numerous specimens were sent in, and three were selected; but the commissioners still did not venture to recommend setting about the work in earnest, and proposed simply to employ

the three selected gentlemen in digesting their own portions independently of each other, and without reference to any general plan. It seems to have been felt almost universally that this would be worse than useless; the scheme was dropped, the commission expired, and nothing of the kind has been attempted from that day to this.

Statute-Law Revision.—But if nothing has been done in the way of construction, at all events a certain amount of rubbish has been cleared away from the site of the proposed edifice. A commission has been at work since 1860 hunting up the old Acts which, though perfectly obsolete and inoperative, or even repealed by subsequent Acts, were still printed in the ordinary editions of the statutes, and tying them as it were in bundles for the fire. Considerably more than 3000 of such Acts have been thus got rid of, either by simple omission, or where necessary by repeal in successive sessions, and the living law is being collected in a new edition of "Revised Statutes," which is already far advanced towards completion, and is expected to contain not more than eight or nine thick folio volumes, instead of about fifty as formerly.

Law Reporting.—Still less has been done for our still more chaotic judiciary law. That law was officially stated in 1866 to be scattered over 100,000 cases, contained in 1300 volumes, and fresh streams were continually discharging themselves into the same reservoir with increasing velocity. The evils which are inherent in this kind of law, in addition to those of mere bulk, have already been commented on. One source of mischief, which did not seem a necessary part of the system, was the private, irresponsible character of the reporters. A judge might, at any time, be pressed to decide contrary to his own opinion on the strength of a reported decision by a colleague or predecessor, without feeling at all sure that

the reporter might not have omitted to notice some fact which had an important influence on the mind of the former judge, and which would distinguish that case from the present one. This evil it was sought to remedy by a system, introduced in 1865, of semi-official reporting, of which the details would not be interesting to the reader, and the effects have not been very important either for good or for evil.

CHAPTER II.

CHANGES IN THE LAWS OF PROPERTY, CONTRACT, AND ABSOLUTE DUTIES.

I. RIGHTS OF PROPERTY.

Subjects of Ownership—Game.—In the catalogue of corporeal things which are not the subjects of ownership, there has been no express change during the last half-century—at least in England; for the mighty movement by which *property in human beings* was abolished in the British colonies, and, as an indirect consequence, over a great part of the globe, does not come properly within our limits. With respect to wild animals, however, the tendency of modern legislation has been, on the whole, to assimilate the more valuable kinds of them, defined as *game*, to *fixtures*—paradoxical as the term may sound when applied to the most mobile of possessions. For, by an Act of 1831, the exclusive right to kill game, and the property of the game when killed, has been vested in the owner, or if he is not in actual occupation, then (in the absence of any contract to the contrary) in the occupier of the soil on which the game happens to be at any given time; and since the owner or occupier who makes it his business to preserve game can generally ensure the constant presence of nearly the same number of each species, he may be said virtually to own all the game.

which frequents his covers, though each individual beast or bird may quit his domain at any moment, and cannot be called his property until it is killed. In practice, wherever game is preserved, it is almost always the act of the landowner, who, in granting a lease to a farmer, expressly reserves to himself the exclusive right of sporting.

Distinction between Real and Personal Property.—A series of enactments, the most important of which will be noticed each in its proper place, have tended to mitigate the inconveniences arising from this arbitrary division, generally by assimilating the rules of real to those of personal property rather than the converse; but the distinction itself remains deeply rooted in the system, as a fertile source of unnecessary intricacy and embarrassment.

Rights "in rem" which have no Definite Subject.—It does not appear that there is any entirely new addition to this class; but the harmless and well-earned monopolies known as *patents* and *copyrights* have been rendered considerably more extensive and valuable, and also better protected. Patents may now be extended by the Privy Council for seven, or, in special cases, for twenty-one years beyond the original fourteen; mistakes in the description of the invention which would formerly have been fatal may be corrected by *disclaimer* of any part which is found not to be really new; the payments, though heavy, are not exacted till the inventor has had time to find out whether the patent is worth keeping up; patents are allowed to be owned and worked by companies as well as by individuals; and provision has been made for their proper registration.

Copyright may now, under the Copyright Act of 1842, introduced by Lord Campbell, be acquired in every book

(in which term is included every pamphlet, sheet of letter-press, sheet of music, map, chart, or plan) published in the United Kingdom, and also in every dramatic representation and musical composition, for the lifetime of the author, and for the further term of seven years, or for the entire period of forty-two years, whichever happens to be the longest. Similar rights may also be acquired, under different Acts and for different periods, in sculptures, models, designs useful as well as ornamental, paintings, drawings, photographs, &c. Another Act empowers Her Majesty, by order in Council, to secure to foreign authors the exclusive right of selling their works in the United Kingdom, but only on the principle of reciprocity, where the like privilege is accorded to British authors by the country to which such foreigners belong.

The exclusive right to the use of a *trade-mark*—i.e., the mark used by a manufacturer to designate the articles made by him—is not strictly property, since it is simply the right which he enjoys in common with the rest of the world to tell the truth himself, and to prevent others from telling lies to his injury. Nor was the case really altered when it was determined by the courts that a manufacturer assigning his business can also assign the right to use the old trade-mark; for this, in fact, merely amounts to a decision that whereas formerly a trade-mark was understood to indicate that the articles impressed with it were manufactured only by a particular individual, it may in future be used to indicate that the article comes from a particular workshop; the trade-mark is still, as before, merely an advertisement of goods offered for sale, not a document of title. The right, such as it is, can hardly be called a new one, for no doubt it would have been enforced in the days of Blackstone if the occasion had arisen; but it is only since the art of advertising attained something

like its present development that "trade-mark cases" have become a prominent and constant heading in the reports both at Common Law and in Equity, and that special provision has been made for them by statute.

The same may be said of *goodwill*, *i.e.*, the exclusive right to represent a professional or trading concern as the continuation of one with which customers are already familiar,—a right which is often found to have a very appreciable money value, as affording a certain presumption that the same machinery and methods, and the same course of upright dealing, will be adhered to by which the original business gained its reputation.

Limits to the Power of Use and Disposition.
—**Law of Mortmain.**—The restrictions imposed by the Mortmain Act of Geo. II. have been in many respects relaxed by subsequent statutes, chiefly of the present reign, just as any particular public object happened to strike the Legislature as specially deserving of encouragement. Of the public objects which have hitherto been so favoured, the principal are—the augmentation of the incomes of the clergy of the Established Church, gifts to the British Museum, the Foundling Hospital, and a few other well-known public institutions, and the granting sites for churches, schools, and buildings to be used for the promotion of art, science, and literature. The extent of land allowed to be acquired in this way is in most cases so strictly limited, ranging from half an acre to two acres, as to remove all danger of the kind which the Mortmain Acts were intended to prevent. Another relaxation is the permission, accorded in 1870, to invest the funds of charitable corporations on mortgage of real property, notwithstanding that they thereby, as we have seen (p. 54), become in a technical sense, though not in reality, the owners of the land.

State Control over Endowments for Charitable Purposes.—Interference with foundations once lawfully created was never attempted, and seldom suggested, until far into the present century. In France, some years before the Revolution, the admirable Turgot had written against the principle of endowments altogether; but his friend Adam Smith, the founder of the English school of political economy, scarcely alludes to the subject in his "Wealth of Nations," where it might have been expected to be prominent. Bentham had given it only a few passing but weighty remarks. In one place he notices "the singularity, that in general these foundations, these particular laws that individuals have established by the indulgence of their sovereign, have experienced more respect than the public laws which originate directly with the sovereign. When a legislator has desired to tie the hands of his successor, this pretension has appeared either inconsistent or futile. The most obscure individuals have arrogated this privilege, and none have dared to disappoint them." In a later work he alludes with especial reprobation to foundations having for their object the teaching of any particular opinions on religion or any other subject, viewing them as a peculiarly subtle and noxious form of bribery. During his lifetime, and for some time after, the efforts, such as they were, of reformers were directed rather to preventing perversions or neglect by trustees of the intentions of founders, than to correcting the mistakes of the founders themselves (*e.g.*, Sir S. Romilly's Act, 52 Geo. III. c. 101). The question might have slumbered for another half century had it not been for the discontent and agitation in Ireland, which drew attention to the abuses of the Irish Church; the attempt to remove those abuses being resisted on the ground of the sacredness of corporate property, people were forced to inquire whence that

sacredness was derived, and so were led back step by step to the first principles of the subject, and were at last enabled to discuss them calmly, without reference to the merits or demerits of this or that particular institution. In this spirit we find the late Mr John Stuart Mill, then a young man of twenty-seven, and in a certain sense an intellectual grandson of Bentham (since his father had lived with the latter many years as a devoted companion and disciple), maintaining in 1833 that the wishes of the founder of a public endowment should be absolutely respected, irrespective of their wisdom, unless positively unlawful, during his life, and for such longer period as the foresight of a prudent man may be presumed to reach, *and no further*. "All beyond this," he says, "is to make the dead judges of the exigencies of the living; to erect, not merely the ends, but the means; not merely the speculative opinions, but the practical expedients of a gone-by age into an irrevocable law for the present. The wisdom of our ancestors was mostly a poor wisdom enough, but this is not even following the wisdom of our ancestors; for our ancestors did not bind themselves never to alter what they had once established. Under the guise of fulfilling a bequest, this is making a dead man's intention for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow."

The principles thus enunciated are now very generally accepted as the proper basis of legislation, and have been actually carried into effect to a very considerable extent. The Charitable Trusts Act, 1853, amended in 1855 and 1860, constitutes a permanent body of commissioners, whose primary function, indeed, is the detection and correction of breaches of trust in the administration of public endowments,—the same function which was formerly dis-

charged less effectually by the Court of Chancery when set in motion through the Attorney-General,—but who are also empowered to frame new schemes where necessary, altering not only the constitution of the body of management, but the very objects to which the funds are to be applied.* Such new schemes, however, do not become law until confirmed by Parliament.

A bolder step was taken in 1840, when it was enacted (3 and 4 Vict. c. 77), that where there was an ancient endowment for a *grammar school*, which had been determined by Lord Eldon to mean a school for teaching Latin and Greek, and nothing else, the Court of Chancery should have power to apply a part of the revenues to the teaching of other useful branches of literature and science. The remodelling of the statutes of the Universities of Oxford and Cambridge, and of the different colleges therein, under Acts of 1854 and 1856 respectively, and the Act of 1871, forbidding them to impose religious tests, may be passed lightly over, as those measures were based rather on the national character of the universities than on the general right of interference with endowments. But in 1861 a Royal Commission was appointed to inquire into the nature and application of the endowments, and into the administration and management of nine of the great public schools of the country, and the result of their inquiry was the Public Schools Act, 1868, amended by several subsequent Acts, which created appropriate machinery for entirely remodelling the government of those foundations, and of the schools of which they respectively formed the nucleus, with or without the consent of the existing governing bodies. In 1869 a still more sweeping measure was applied to all the other endowed schools in England, with the exception of elementary schools receiving Government grants, and

training institutions for certain special purposes. New schemes might be framed in all cases, quite irrespective of the founder's directions or of any proved abuse of trust, which were to become law on being approved by the Education Department and not disapproved by Parliament; and in all such schemes it was a *sine qua non*, unless the very object of the foundation were a sectarian one, that no religious test should be required from members of the governing body, and that no scholars should be required to receive religious instruction of which their parents should disapprove. Special provision was also made for the extension of educational benefits to girls as well as boys. In 1874 the powers of these commissioners were transferred to the Charity Commissioners, and the work of reorganisation is still proceeding.

Trusts in Private Life.—Most male persons of the upper and middle classes, who have friends and relations and a fair reputation for honesty and common sense, are asked at some time or other to become trustees of a marriage settlement, a will, or some other instrument. They get nothing by it, and may incur a good deal of trouble and responsibility; they may be made to pay out of their own pocket for yielding too readily to the importunities of the very friend who asked them to assume the office, for the misconduct of a co-trustee, for misconstruing an ill-drawn instrument, or for a mistaken view of some doubtful point of law. There is a story of an eminent conveyancer, a special authority on the subject of trusts, persistently refusing to become trustee for any body; that his example is not generally followed, is due partly perhaps to ignorance, partly to pure good nature, but also to the consideration that each in turn may require a similar service. However, the discomfort of the position has been considerably lightened by a course of legislation

commencing with the first year of William IV.; trustees of money, stocks, or securities may now free themselves from responsibility by handing them over to be administered by the Court of Chancery, though, of course, at a considerable expense to the parties beneficially interested; in some cases they can obtain, at a considerable expense, the advice of the Court beforehand upon a doubtful point, which of course they will be perfectly safe in following. Other modern statutes provide against the awkward consequences which used sometimes to follow from the death, retirement, absence, or incapacity of a trustee, and extend the list of authorised investments to which every trustee may safely resort when not expressly forbidden by the terms of his trust-deed. For these improvements we have chiefly to thank two Lord-Chancellors—Lord St. Leonards and Lord Cranworth.

Life Owners.—The period after the Reform Act of 1832, and still more that after the repeal of the Corn Laws (1846), has been marked scarcely less by zeal for improvements in agriculture than by commercial and manufacturing enterprise. A serious obstacle to such improvements was found in the fact that a very large part of the soil of England was tied up under family settlements of one kind or another, in such a way that the actual proprietor, having only an estate for life, had little or no inducement to make large permanent improvements, of which the expense would have to be borne by himself, while the returns might only be realised by a successor in whose prosperity he perhaps took no interest. The same system was adverse even to those minor improvements, and that careful husbandry which depend upon the farmer rather than the landowner, for a farmer whose term of occupation was uncertain could hardly be expected to do anything but extract the greatest possible

immediate profit from the soil without regard to its subsequent fertility ; and uncertain his tenure necessarily was, when the landowner was unable to grant a lease which would hold good beyond his own life-time. Another evil, flowing from the impossibility of selling such estates to any advantage, was that, as Bentham had pointed out, land was constantly prevented from passing into the hands most likely to make a good use of it. These evils admitted, it is true, of a remedy by the art of the conveyancer, either using the machinery of trustees or giving special powers to the tenant for life ; but such devices added so much to the complexity of titles, and consequent difficulty of dealing with the land, that they were almost as bad as the disease. These considerations led to the passing, in 1856, of the "Leases and Sales of Settled Estates Act." By this Act, as amended by Acts of 1858 and 1874, life owners are empowered to make leases for twenty-one years, irrespective of their own lives, and for longer periods with the sanction of the Court of Chancery, for mining and building purposes ; they are also allowed, with the like sanction, to sell the land out and out, in which case the proceeds are applied, under the direction of the Court, to the purchase of other lands, or to other purposes beneficial to their successors, and are in the meantime invested in consols, the income only being paid to the tenant for life. Other Acts have enabled life owners to borrow money from Government or private persons for drainage works and other permanent improvements, repayment of principal and interest being secured by a rent charge on the land for a fixed term of years. The latest Act of this kind, passed in 1870, applies to the erection or improvement of the principal mansion-house itself. Under some of these Acts the sanction required is that of the Court of Chancery under others

that of the Inclosure Commissioners, a modern institution of which we shall have more to say further on.

The harsh view taken by the old lawyers of *waste* by life owners (p. 31) was softened, as regards waste by mere neglect (called *permissive*), by subsequent judicial decisions, and in 1833 the ancient writ of waste, with its disproportionate penalty of forfeiture, was entirely abolished, leaving to the expectant successor his right to recover in an ordinary action compensation for injury actually done to his interest in the property; besides which he had always in Equity, and has had since 1854 at Common Law also, the right to have threatened waste prohibited beforehand by an *injunction* (*vide infra*).

Copyholds.—The abolition of this tenure, inconvenient to both lord and tenant, and proportionately adverse to agricultural improvement, had been recommended in 1826 by an eminent conveyancer of the name of Humphreys, in a treatise which Bentham took as his text for an article in the *Westminster Review*, agreeing cordially with its author on this as on most other points, but not being very sanguine of early success. However, in 1841 the Legislature took a first step in that direction by permitting the *enfranchisement* of copyholds,—*i.e.*, their conversion into freeholds—by agreement between lord and tenant. The next advance was the “Copyhold Act, 1852,” enabling either party to *compel* the other to enfranchise on certain terms; and the process was further facilitated by an Act of 1858. A permanent body of “Copyhold Commissioners” superintends the working of these measures, whereby the ultimate disappearance of the tenure is reduced to a mere question of time. The peculiarities noticed at p. 33, with regard to the mode of disposing of copyholds by will, were partially removed in 1815, and entirely by the Wills Act of 1837.

Common Rights.—Bentham's attention had been principally directed to the mischiefs incident to every kind of ownership in common; the temptations to discord, and the diminished inducements to improve. The process, which was going on incessantly throughout his long lifetime, of distributing waste and common lands among the adjoining landowners, by means of private Acts of Parliament, is described by him, or rather by his French interpreter, in the most glowing language of approval:—"When we pass over the lands which have undergone this happy change, we are enchanted as with the appearance of a new colony; harvests, flocks, and smiling habitations have succeeded to the sadness and sterility of the desert. Happy conquests of peaceful industry, noble aggrandisements, which inspire no alarms, and provoke no enemies!" Unfortunately, there was another side of the question which appears to have escaped him, and which was still less likely to occur to a Parliament of landowners. In these Inclosure Acts, the rights of persons other than the lord of the manor were neither denied nor deliberately violated; but two very questionable assumptions were made with regard to them. First, it was assumed that the rights of the freehold and copyhold tenants of the manor, such as the right to cut turf and faggots, or to turn out geese or cattle on the common, could properly be compensated by a lump sum paid to the individual claimant; whereas morally, if not legally, he should have been considered as representing unborn generations, who should have been compensated in the only possible way by means of some permanent benefit conferred on the class. Secondly, it was assumed that all rights which did not definitely belong to some one else belonged to the lord of the manor; whereas we have seen that his original position was rather that of trustee and

manager for the public. If the public was thought of at all in the matter, it was as indirectly profiting by the increased productiveness of the enclosed land, and not as sustaining any loss which could possibly need to be compensated. So the work of Inclosure went briskly on, and was reduced more and more to a system. First, the private Acts were simplified by one general Inclosure Act, 41 Geo. III. c. 109, containing the rules applicable to all cases; then in 1836 the intervention of Parliament was dispensed with for the future in the case of one species of common lands, namely, those subject, not to the seigniorial rights of the lord of the manor, but to the mutual rights of the proprietors to depasture each other's fields at certain seasons; such rights might be extinguished with the consent of two-thirds of the persons interested, on terms to be fixed by commissioners appointed at a public meeting. In 1845 the functions of these commissioners were transferred to two permanent "Inclosure Commissioners," appointed by the Crown, and acting for the whole of England and Wales; but their power to enclose without sanction of Parliament was very strictly limited, and was altogether taken away by an Act of 1852. At this time only a very faint suspicion had dawned on the minds of statesmen that other interests might require protection. It is true that open fields in the immediate neighbourhood of large towns were excepted from the Act of 1836, and the Act of 1845 protects village greens, and enables the persons having definite rights over common lands (not the general public) to devote a part of them for roads, recreation grounds, and other public purposes. But the general assumptions above noticed passed unchallenged, and were rather confirmed than otherwise by the course of legislation. During the last twenty years, however, we have been very forcibly reminded in many ways of the

evils to which we are exposed from concentrating our population in large cities, while the taste for country excursions and recreations and the appreciation of scenery have been stimulated among all classes by improved education and multiplied facilities for locomotion. The volunteer movement, commenced in 1859, and other changes in our military organisation, involving more frequent manœuvring of large bodies of troops, made the question more obviously and directly, if not more truly, a national one than it would otherwise have been. At the same time, the extension of the area of cultivation in our small island, though still highly important, has become a less vital and all-engrossing object since we have learned to draw supplies of food from distant lands in both hemispheres. Hence a growing feeling in the public mind in favour of retaining open spaces wherever possible, at all events in the neighbourhood of large towns. Unfortunately, the same considerations made lords of the manor more intent than ever on asserting what they supposed to be their rights. The importance of open spaces to the health and enjoyment of a neighbouring population was the measure of the price they might hope to extort from municipal bodies or voluntary associations, if they could prove themselves in a position to threaten building as an alternative; and the only obstacle to their doing so was the co-existence of certain rights of common in the freeholders and copyholders, which they would willingly buy out if they were allowed to do so. The holders of such rights had a strong pecuniary inducement to sell them; for turning out cattle on a bare common was not much in accordance with the notions of modern farmers; nor, when coal was reasonably cheap, was there any great object in cutting turf and underwood for fuel. If they held out against the proposals of the lords, it was

in order to secure for the public as well as for themselves the enjoyment of the commons as recreation grounds. But even the public were in danger of forgetting their real interest in the matter, when they found the commons boggy for want of drainage, disfigured by gravel-pits and turf-cutting, covered with all sorts of refuse and rubbish, and haunted by tramps and gypsies. The lord had no pecuniary inducement, and the commoners had not the power, to exercise a proper superintendence; in short, where everybody's rights were undefined, it was nobody's business to do anything. The chief battle-fields for these conflicting interests were three of the most beautiful and extensive commons in the neighbourhood of the metropolis—Hampstead Heath, Wimbledon Common, and Epping Forest. In the first case, the lord was in direct conflict with the public at large; he believed himself to have the power, and fully intended, to buy out the commoners, to exclude the public altogether, and to let the land for building purposes. As it was calculated that about 50,000 people were in the habit of resorting to Hampstead Heath on a fine Sunday, this would have been a serious matter, and funds would probably have been forthcoming to secure the land for the public even at building prices, had there been no other alternative. At Wimbledon the lord made what was on his view of his legal rights a rather generous offer, to sell portions of the common for building, and to expend the proceeds in keeping up the remainder, more than two-thirds, as a trim, well-ordered park, open to the public at all reasonable hours, and with especial provision for the annual rifle matches which had now become one of the great national festivals. The local and general public were much obliged to him for his good intentions, but took a different view of his rights, and preferred to keep their common with its full extent and

its natural wildness. In Epping Forest the question was complicated by the existence of certain old forestal rights in the Crown; the king had from ancient times been entitled to breed and hunt wild deer and other animals, and to prevent any enclosures which would interfere with their habits or his enjoyment. There were no longer any deer in the forest, and the profits of the Crown lands were, by arrangement with her present Majesty, made applicable as national revenue; but it was suggested that the national trustees ought to use their Crown rights, as private copyholders had often used their rights of common, in order to prevent any kind of enclosure. To deal with all these questions a "Commons Preservation Society" was started in London, whose efforts resulted in the appointment by the House of Commons of a Select Committee to consider the matter in 1865. The immediate fruit of their labours was the "Metropolitan Commons Preservation Act, 1866," forbidding enclosures altogether within fifteen miles of London, and providing for the local management of commons within that area; but the Act provides for compensation of any rights affected by such management, leaving the question, what are the rights of the lord, the commons, and the public, still to be determined by the tribunals; so that we are far as yet from having seen the end of the matter. It should be mentioned to their honour, that several lords of the manor offered of their own accord to resign their rights into the hands of any local authority which might be empowered to use them for the public benefit.

II. TITLES TO PROPERTY.

Transfer by Act of the previous Owner.—Public registration of the titles to property, recommended by Bentham, as by many other persons, as a mode of facili-

tating its transfer, as well as of giving security to lawful possessors, has been applied since his time to copyright and patent-right, to ships and shares of ships, and, in a somewhat different sense, to shares in public companies. In many civilised countries, including several of our colonies, and some States of the American Union, whose law is derived from ours, the same principle has been successfully applied to land, rendering it almost as easily transferable as a ship or a horse; but in England such an improvement is still a thing of the future. It was recommended as early as 1830 by a Royal Commission, to whose report is appended, amongst many other communications, one sent by Bentham on their express invitation, and printed at full length—unfortunately in his latest and least presentable style of composition, and not likely to have produced much effect. With the exception of some improvements in the registration of obstacles to transfers, arising from the commands or claims of the State itself, in the shape of judgments, Crown debts, and pending suits, no attempt was made for the next thirty years or so to extend the registration system beyond the two countries to which it had long been awkwardly applied. In 1862 Lord Westbury procured the passing of two Acts, which *permitted* all landowners to register their titles, and their subsequent dealings with the property; but for some reason or other the persons concerned, or the lawyers who acted for them, continued to prefer the old methods, and the Acts, not being compulsory, have remained nearly a dead letter. A similar system is said to succeed rather better in Ireland.

Recoveries and Feoffments.—A good many minor improvements have been made in our system of transferring real property. In 1833 the “Act for the Abolition of Fines and Recoveries, and for the Substitution of more

Simple Modes of Assurance," swept away perhaps the most absurd complication of fictions in the whole range of English law. In 1845 the "Real Property Amendment Act" rendered it unnecessary to evade, by *lease and release*, or any other circuitous method, the primitive ceremony of *livery of seisin* (pp. 36-39), and a single *deed of grant* became the appropriate means of transferring freehold property of whatever kind, *corporeal* as well as *incorporeal*. This seems a convenient opportunity for remarking that the *sealing and delivery* which formerly (p. 36) distinguished a deed from other written instruments, is now represented by the form of the party executing it touching a common waxen seal or wafer previously affixed to the instrument opposite his signature, and saying at the same time, "I deliver this as my act and deed," without actually delivering it to any one. The presence of one or more witnesses is usual, and in some cases necessary, and a deed is usually, though not necessarily, written on parchment instead of paper for its better preservation, and with lines of a most inconvenient length; but the only peculiarity which it makes it practically important to know which transactions do, and which do not, require a deed, is the stamp-duty payable on it, amounting at the lowest to £1, 15s., and often to much more, without which it is not admissible as evidence in a court of justice, whereas only a sixpenny stamp is required for other written agreements. Some of the statutes which have had for their effects the shortening and simplification of conveyances having been noticed already, the above specimens of the meritorious, if somewhat narrow, reforms which have hitherto been accomplished in this direction will perhaps be sufficient.

Wills.—The same body of "Real Property Commissioners," the fate of whose second report on land-registration

we have just noticed, produced in 1833 a fourth report on wills, which led to a better result. The Wills Act of 1837 (1 Vict. c. 26), which is still the leading enactment on the subject, prescribes one uniform mode of execution for wills affecting every kind of property, freehold or copyhold, real or personal, legal or equitable, corporeal or incorporeal. Striking a just balance between the cumbrousness of one and the dangerous laxity of the other of the conflicting systems formerly in use, it requires the will to be signed by the testator, or by some other person in his presence and by his direction; such signature must be made or acknowledged by him in the presence of at least two witnesses, present at the same time, and those witnesses must attest and subscribe the will in the presence of the testator. The will is revoked at once by the marriage of the testator, without waiting for the birth of issue; it is also revoked by another instrument properly executed as a will, or by complete and intentional destruction; but obliterations and interlineations have no effect, so long as the words originally written are by any means discernible.

The duties of an executor under a will being substantially the same as those of an administrator on intestacy, both were dealt with together at a later period, as we shall see; but one change, which had been effected even before the Wills Act, may be mentioned here, namely, that an executor was no longer permitted to retain for his own benefit any personal property which the testator had left undisposed of, but was considered to hold it in trust for those who would have taken it on intestacy.

Inheritance.—It has been already stated by anticipation, that the rules of succession to personal property have remained to this day as they were fixed by the statutes of Charles II. and James II. It is not quite the same with *succession to real property*. Its main principle, the rule

of primogeniture, remains untouched, though threatened from afar, and defended, if at all, on grounds which had very little to do with its original institution. But two or three minor changes were recommended by the Real Property Commissioners above-mentioned, and carried into effect by an Act passed in 1833.

The descent is now traced in all cases from the last owner, not the last *purchaser* (p. 44). The father now comes in his proper place, after all the children, but before brothers and sisters; and other lineal ancestors on the same principle.

A kinsman of the half-blood comes next after a kinsman in the same degree of the whole blood.

As to the widow's right of dower, experience had shown that she very seldom derived any benefit from it; it was so inconvenient to husbands, from the inalienable character which it impressed on their lands, that they taxed the ingenuity of conveyancers to devise modes of so purchasing lands that the right should never attach. The required inventions were forthcoming, but were, of course, both circuitous and expensive. In 1834 the knot was somewhat roughly cut by putting the dower entirely in the power of the husband, so that, like other rights of succession in England, it applies only to the case of intestacy, and only to property which belonged to the deceased at his death. For the wife, as for the children, the only effectual protection against the caprice or thriftlessness of the head of the family is that afforded by a marriage settlement.

With these rules of succession, it will be interesting to compare those recommended by Bentham:—

1. No distinction between the sexes.
2. After the husband's death, the widow shall retain half the common property, unless some different arrangement was made by the marriage contract.

Table of Descent of Real Property.

13. Grandfather, or more remote ancestors and issue (same order as 9-12).

9. Father = 14. Mother, or more remote female ancestor and her issue by other husband.

Propositus. ¹	10. Eldest or only brother (whole blood) or issue.	11. Daughters (whole blood) or issue (as under 33).	12. Brothers, sisters, &c., half-blood (in like order).
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1. Eldest or only son.

6. Eldest daughter.

6. Younger daughters.

7. Eldest daughter's issue.

8. Their issue.

2. Eldest or only son of (1), or more remote descendants in male line.

3. Eldest daughter of (1).

3. Youngest daughter or daughters of (1).

4. Her issue (in like order of priority).

5. Her or their issue (in like order).

¹ i.e. The last owner, from whom the descent is traced.

3. The other half shall be distributed among the children in equal proportions.

4. If a child (of the intestate) dies before his father, leaving children, his share shall be divided among his children in equal proportions; and so of all descendants.

5. If there are no descendants, the property shall go to the father and mother,—subject, of course, to the widow's moiety.

6. If one of the parents is dead, the share of the deceased shall go to his or her descendants, in the same way as it would have gone, had there been any, to the descendants of the deceased child.

7. Failing such descendants of the deceased parent,—in other words, if there are no brothers or sisters of the intestate,—the whole property shall go to the surviving parent.

8. If both father and mother are dead, the property shall be divided as above among their descendants.

9. But the part of the half-blood shall be only half as great as the part of the whole blood.

10. In default of relations in these degrees, the property shall go into the public treasury.

11. Under condition, however, of distributing the interest in the form of life-annuities among all the relations in the ascending line in equal shares.

If any extension were to be made of the heritable degrees, he was disposed to make it in favour of the uncle.

As the fiscal resource of devoting to the public the estates of deceased persons, in preference to all whose relationship would be too remote to give rise to any natural expectation if the law were silent on the subject, was a favourite notion of Bentham's, derived, perhaps, from Adam Smith, and further developed by Mr J. S.

Mill, it ought to be mentioned that, though not adopted in its entirety, or at all in the form which he suggested, its principle was partially applied by the Succession Duty Act of 1853, the effect of which, in conjunction with the legacy duties to the same amount which are much older, was to give to the State one-tenth of the property as against all the relations whom Bentham would have excluded, and smaller fractions of it as against nearer relations.

The latest development of the English laws of inheritance is the Succession Act for British India, framed in 1865 by Sir Henry Maine. It makes no distinction between real and personal property, and follows in almost every respect the English rules for the devolution of the latter.

Title Adverse to the Previous Owner—Distress.—The hardship to which lodgers were liable, of having their furniture and goods distrained on account of rent due from their immediate landlord to the superior landlord (p. 46), was at last removed in 1871.

Execution.—The anomaly noticed in the earlier part of this work (p. 46), that only *half* the freehold and none of the copyhold lands of a defaulting debtor could be taken in execution, survived down to the commencement of the present reign, nearly two centuries after the formal, and many centuries after the virtual, abolition of that feudal system which alone supplied the shadow of a reason for it.¹ By 1 and 2 Vict. cap. 110, among other new reme-

¹ Bentham puts the case thus :—"Your debtor owes you £2,000. Movable or other personal property not worth recurring to ; land or other real property worth £1,000 ; his body out of the reach of justice. Of his £1,000 you may have half, and *but half*. Why? Answer :—because, had you and he lived three or four hundred years ago, it might (unless he were an old man, or an old woman, or a young one, or a child, with a dozen or two of other exceptions, not one of them taken into the account) it *might* have been of use to the purposes of national defence that your debtor should keep in his hands half the

dies given to creditors, they were empowered to take the whole of the debtor's real estate, copyhold as well as freehold.

Bankruptcy.—The law on this subject was consolidated in 1825, but not very materially altered from what it had been in the time of Blackstone. A number of new enactments, all applicable only to *traders* owing more than £300, were passed in the interval between 1825 and 1849, in which last year they were again consolidated. Of the Act of 1849 the principal features were—(1), that a trader could make himself a bankrupt without waiting for the action of any creditor; (2), that the property of the bankrupt was vested during the proceedings in an officer of the Court jointly with an assignee appointed by the creditors; (3), that when all the debts were paid, and the property distributed as far as it would go, the bankrupt received the surplus, if any, and a certificate protecting him against all further liability; the certificates being classified, for the guidance of those who might wish to know whether to trust the bankrupt in future, as of the first, second, or third class, according as his insolvency appeared to have been due wholly, partially, or not at all, to unavoidable misfortunes.

Insolvency.—As to insolvent non-traders, and traders whose debts were less than £300, they remained down to 1826 in the same unsatisfactory condition as before, with their lands, as we have seen, unjustly protected, but themselves amenable to perpetual imprisonment at the pleasure of their creditors, and incapable of ever obtaining a dis-

property, the whole of which should have been yours: keep it lest the monarch should want men to attend him in his wars. Even in its prime, the reason was a foolish one, the fund bearing no sort of proportion to the purposes for which in pretension it was designed; and when creditor A had cut off his half, creditor B would come and halve *that half*, and so on, alphabet upon alphabet, in any number."

charge from liability except by payment in full. An Act of that year first enabled a debtor actually in prison to obtain, by a surrender of all his real and personal property, a release from his confinement, keeping him still liable for all the unpaid portion of his debts, whenever the Court should be satisfied of his ability to pay them. Subsequent Acts (1842-1857) extended the full benefits of bankruptcy, though under a different name and by different machinery, that of a *Court for the Relief of Insolvent Debtors*, to persons who had become indebted without fraud or gross or culpable negligence. At last, by Lord Westbury's Act of 1861, this most awkward and unnecessary double machinery was abolished; proceedings in "bankruptcy" were for the future to be applied to traders and non-traders alike in the same set of Courts; both alike, if they had acted properly in surrendering all their property and giving full information, were discharged from all future liability without any classification of certificates; but there still remained certain differences as to what were "acts of bankruptcy" in the case of traders and non-traders respectively. The law as thus altered was probably as satisfactory as it could well be made to the insolvent part of the population; but not so to the solvent part, still happily the majority, who were scandalised again and again by the sight of some reckless adventurer embarking in large speculations with borrowed money, living, perhaps, for years in luxury till a crash came, then passing gaily through the Bankruptcy Court, paying perhaps a farthing in the pound, and starting again a free man, with no capital, it is true, but with a stock of experience and connections which might soon make him richer than ever, while not a penny of his new acquisitions could be touched by his creditors. Nothing could well be better calculated to aggravate the worst dangers inci-

dent to a commercial society like ours, or to discourage patient industry and integrity. This evil has now been at least partially remedied by the Bankruptcy Act of 1869, one of the earliest, and certainly not the least important, of the measures of the late Gladstone Government. Under this Act the after-acquired property of the bankrupt remains liable until he has paid half his debts all round, or been released by a special resolution of his creditors. Of the other changes made by this Act, the most important are those which relate to the management of the debtor's property, which is now almost entirely withdrawn from official interference, and vested in the creditors themselves, who act for most purposes through a trustee of their own selection, for some purposes by a committee selected by and among themselves, and for a few purposes only by general meetings of their whole body.

Title of Dead Man's Creditors (Administration, p. 48).—In 1807 the freehold estates of deceased traders were made chargeable with the payment of all debts, whether by simple contract or by deed, created in the course of their business. Purely arbitrary as was the line thus drawn, the Legislature persistently refused to extend the same rule to non-traders or to copyhold estates throughout the whole of the pre-Reform-Bill period. Sir S. Romilly's failure on this point has been already mentioned; but the reader will note with interest, that it was the son of that great and good man, the late Lord Romilly, who in 1833 had the honour of introducing a Bill to that effect which was passed with little or no opposition. Two more Acts should be mentioned, in order to complete our history of this part of the law—*Locke King's Act* of 1854 and *Hinde Palmer's Act* of 1869. The first corrected the anomaly that where the real and personal estate of a deceased person devolved

upon different successors, the successor to the personal estate had to pay off any mortgages which might be subsisting on the real estate. The other abolished the priority of *specialty* over simple contract debts (p. 48). The priority of Crown debts and *debts of record* (*ibid.*) remains as before.

Title by Judicial Decree.—A remarkable discovery (?) was made in 1831, apparently by Lord Brougham in connection with a Bankruptcy Act of his, and was applied in 1850 to the matters dealt with by the Trustee Act above mentioned, namely, that property could be transferred quite as effectually by an order of the judge declaring So-and-So to be the owner, called a *vesting order*, as by an order that the previous owner should execute a legal conveyance in a form approved by the Court.

Prescription and Limitation (p. 49).—The venerable era of the commencement of legal memory, the first year of Richard I., was gently consigned to oblivion by the Prescription Act of 1832, which declared that the right to prevent the obstruction of window-lights should be acquired by *twenty* years of uninterrupted enjoyment, and fixed *forty* years as the longest period which could under any circumstances be required in order to give an indefeasible title to rights of way, rights to the use of water, and other *servitudes* or *easements*—*twenty* years, however, being in most cases sufficient for these also. Another Act passed in 1833 barred all actions for the recovery of landed property after *twenty* years, and this term is to be reduced to *twelve* years under an Act passed in 1874, but not to come into operation till 1879; with an extra allowance, however, where the person who should have sued was during part of the time under age or otherwise incapacitated for so doing. It is a significant

illustration of the way in which railways and telegraphs have bound the whole globe together, that in this last Act "absence beyond seas" is no longer, as formerly, recognised as a disability entitling to an extension of time.

III. CONTRACT AND ABSOLUTE DUTIES.

Reason for Scanty Treatment.—A great part of the law of contract must here be passed over with very slight notice, not certainly, as in the first part of our history, for want of materials, for this department is perhaps more than any other the creation of the last hundred years, still less from its lack of interest and importance; but because, its development having been very gradual, consisting chiefly in the application of old principles to new facts, and it being consequently embodied more in judicial decisions than in statutes, its interest and importance could hardly be set before the reader in their true light within the space at our command. It will be prudent to confine our attention to the innovations affecting—(1), the general law of contract; (2), three very peculiar kinds of contract, viz., *pledge*, *mortgage*, and the contract between *landlord and tenant*; and (3), certain remarkable instances in which contracting parties are subjected by mere operation of law to additional non-contractual obligations; warning the reader at the same time, that the branch of law which is here dismissed in a few scanty paragraphs, is the one of all others which has most constantly expanded itself with every advance in civilisation, and which has been thought by some jurists to be destined ultimately to monopolise nearly the whole field of jurisprudence.

Modes of Creating Contracts.—In the laws affecting contracts generally, the points which have given rise to most discussion and alteration have been the modes of

creating them, and the exceptions to the general rule in favour of enforcing all contracts freely entered into for substantial consideration. In regard to the first point, contracts² by *deed* are likely to go more and more out of fashion, since they have lost, as we have seen (p. 213), their ancient priority over other claims against a dead man's property, and since corporations, whose contracts are required to be by deed, have almost ceased to be created, their place being supplied by such unincorporated companies as we shall have to describe, which can contract through a duly authorised officer without deed. Even as to the old-fashioned corporations, the exceptions have become so extensive, as to leave very little importance to the rule itself. The requirements of the Statute of Frauds as to *writing and signature* (p. 52) have been extended to several new kinds of contracts by subsequent statutes, of which the chief is known as Lord Tenterden's Act (9 Geo. IV. c. 14).

Usury Laws.—With regard to the second point, the list of contracts which the law refuses to enforce has undergone considerable alteration both by omission and by addition. Thus in 1833, the very next year after Bentham's death, his exposure of the folly and injustice of forbidding lenders to accept such interest for their money as borrowers might think it worth their while to offer (p. 144), which had been the best executed enterprise of the first half of his life, began at last to bear practical fruit in the shape of legislation. By an Act of that year, bills of exchange and promissory notes payable at short dates were exempted from the operation of the

² The word "contract" is here used as opposed to, not as including, "conveyance"—i.e., transfer of property,—for, as has been stated (p. 204), modern legislation has rendered deeds even more indispensable than before for the conveyance of real property, as they are for the most valuable and permanent kinds of personal property.

usury laws; and in 1839 this exemption was extended to all loans of money above £10 not secured on land. These Acts were intended to be only temporary and experimental, but they were continued from time to time, as the experiment seemed to answer, until at last, in 1854, they were superseded by a general enactment entirely repealing all that remained of the laws against usury.

Wagers.—As early as 1780 the judges had determined that a wager connected with a game, such as “hazard,” which was itself illegal, could not possibly be tried in a Court of law; one of them, Lord Loughborough, on that occasion entertaining the bar with a solemn profession of entire ignorance and abhorrence of an amusement which was known to be a favourite one with the princely and noble circles in which he delighted to move, and one at which scandal related him to have sat up far into the small hours of the very morning on which his tirade was delivered. The noble writer who retails this story (Lord Campbell) goes on to relate with just pride, how the general rule that wagers were enforceable remained sticking in the Common Law for another seventy-five years; how sorely the judges were puzzled to find excuses for evading it, and for refusing to try any trifling, ridiculous, or insoluble question which a wag might choose to raise in that shape; and how at last he himself, in 1845, procured the passing of an Act which rendered all agreements by way of gaming or wagering absolutely unenforceable. At the present day, when a betting man speaks of his lost wager as “a debt of honour,” if he means thereby to imply that he is *more* bound in honour to discharge it than to pay his butcher or his baker, he is of course insinuating what is utterly false and immoral; but if he simply means that the former debt can *only* bind

him, if at all, through his sense of honour, and is not enforceable at law, he is correctly describing the law as it is and as it ought to be.

Stock-Jobbing.—In connection with the subject of wagers it should be mentioned, that buying and selling shares on the Stock Exchange, not with a view to an actual transfer, but to the payment of “differences” according as the market price of the shares might be higher or lower at the time of settlement, had been forbidden by an Act of Geo. II., known as Sir John Barnard’s Act, as being a pernicious form of gambling, but that Act was repealed in 1860 as injurious to legitimate commerce, and such contracts became again legally enforceable.

Contracts in Restraint of Trade.—The old principle of the Common Law, that contracts not to exercise a trade or business were, with certain exceptions, void as being against public policy, received a rather alarming application in the years 1867 and 1868 to the affairs of trades’ unions, by two decisions (*Hornby v. Close* and *Farrer v. Close*), which seemed to imply that the rules of such unions were not only unenforceable as contracts, but illegal, if not in the sense of being criminal, at least in the sense that money entrusted to an officer of a trades’ union whose rules contemplated such a purpose as the support of a strike might be embezzled by him with impunity. The terror and dislike inspired about that time by a number of murders and outrages committed at Sheffield and elsewhere in connection with trades’ unions contributed probably to delay the removal of this injustice, which was at last effected by the Trades’ Union Act, 1871. This Act also declared that agreements in restraint of trade were neither criminal nor so unlawful as necessarily to vitiate any agreement or trust collateral to them, though it guarded itself against making agree-

ments between workmen not to work except on their own terms legally enforceable.

Truck.—This means an agreement by a workman to receive the whole or part of his wages in kind. It was found that the effect was apt to be oppressive, enabling the employer to force his own perhaps inferior goods on his workmen at an exorbitant price. A number of Acts were passed in the usual tentative fashion to restrain the practice in one trade after another, which were consolidated by the Truck Act of 1831. A commission has lately been appointed to inquire into alleged defects in the working of this Act, which will probably lead to further legislation.

Partnership.—The laws relating to private partnerships were passed over in the first part of this work, as presenting no very striking features for praise or blame; but a serious flaw in them was brought to light through the same peculiar tendency of our modern life which forced itself upon our notice in the two preceding paragraphs. When the constant, organised strife between employers and workmen led thoughtful men to try experiments in the direction of harmonising the interests of the two parties by making the wages of the workman depend on the profits of the employer, it was discovered that the law as it stood presented an almost fatal bar to such experiments, since any such arrangement would render the workman *liable, as a partner, to all the debts of his employer*. The difficulty was first reduced to narrower limits by means of judicial decisions, partially overruling the earlier ones, and at last taken away altogether by legislation (1865). The same Act abolished certain other *involuntary partnerships*, based on the same principle, that *an agreement to share profits is a contract of partnership*.

Pledge.—The shape which this contract most commonly assumes is that of pawning some article of wearing apparel or furniture in consideration of the loan of a sum considerably under its value, the article to belong absolutely to the pawnbroker unless redeemed within a year by payment of its full value. Bentham pointed out in his Defence of Usury that pawnbroking was in fact a form of usury, and that the law was therefore inconsistent in permitting it at all. The Legislature seems to have taken the hint from him or from some one else; his pamphlet was written in 1787, but not printed till 1816, and in 1789 an Act was passed, which, among other regulations, fixed a maximum scale of charges which it was penal to exceed. This restriction has outlasted all the other laws against usury, and is retained in a modified form even in the last Pawnbrokers' Act, passed in 1872, in defiance of the generally accepted principles of free trade.

Mortgage.—The general tendency of modern legislation has been to treat this transaction simply as a transfer, collateral to a contract of borrowing, of so much of the rights of ownership over land, or some other permanent thing, as will enable the lender to repay himself the loan, with interest and expenses, and no more. Thus a *power of sale* is now a necessary incident to every mortgage, instead of depending as formerly on express contract; while, on the other hand, the process of *foreclosure*, originally the main object of the mortgage, and that to which it owed its name, as that whereby the "pledge" became "dead" to its original proprietor (p. 54), dwindled down to nothing but a particular method of arriving at a sale. Nevertheless, we still retain what modern men of science would call a "survival," in the shape of a formal transfer to the mortgagee of the legal ownership, purporting to be absolute and final unless the debt be paid within six months.

Landlord and Tenant.—The changes in this part of the law which have been proposed, discussed, and foreshadowed by legislation elsewhere, are of a very extensive character, but the changes which have been actually carried out in England are of quite second-rate importance. The tremendous possibilities of oppression involved in the English theory of land-owning have led comparatively few politicians to question the right itself, but have led a good many more to advocate considerable restrictions on the freedom of contract between parties so unequal in power. For instance, there has long existed a powerful agitation for the abolition of the game-laws,—a measure which, as between landlord and tenant, would be perfectly inoperative unless accompanied by a refusal on the part of the State to enforce any contract whereby a tenant gives the exclusive right of sporting to his landlord.

The Irish Land Act.—In Ireland, where the laws are generally the same, but certain historical causes render any defect in them productive of far more immediate and practical injustice, a sweeping change in the relations between landlord and tenant was one of the measures by which the Gladstone Government endeavoured to produce a better state of feeling in that part of the United Kingdom. With the Irish Land Act of 1870 we have here nothing to do, except in so far as it may be thought to foreshadow either some similar limitation on the freedom of contract in England, or some redistribution of proprietary rights in the soil; or, thirdly, some economical change which will enable tenants to secure for themselves by contract a greater fixity of tenure. The characteristic feature of that Act is, that contracts by which the tenant surrenders the rights to compensation for improvement or to security against eviction, with which the Act itself invests him, are declared to be, generally speaking, unenforceable.

Carriers.—Persons of this class were in 1830 exempted from their extra-contractual Common Law liability for the loss of certain specified kinds of property exceeding £10 in value, unless the value should have been declared at the time, and an increased charge paid accordingly. With respect to the carriage of other kinds of property, the next change, made in 1854, was rather in the opposite direction, forbidding railway and canal companies, to whom alone it applied, to limit their Common Law liability by any general notice, though they might still do so to a reasonable extent by special contract in writing with each individual. Similarly,

Innkeepers were in 1863 exempted from liability for goods brought into the inn above the value of £30, unless entrusted to them with special precautions (p. 57).

Absolute Duties.—A good many new positive, absolute duties have been laid upon us in the present century, but most of them are here omitted as purely political or economic. We may observe, however, that Bentham's strong and constantly expressed opinion as to the importance of *registration* as a mode of facilitating all kinds of legal proceedings has at last fully impressed itself on the public mind. Tattooing, indeed, as a security for personal identification, is not as yet even encouraged, much less made compulsory as he suggested, though the utility of it was strikingly illustrated in a recent trial; but the duty of registering births has now been thrown on the parents, as well as on the official registrar, and the duty of registering deaths on the relatives or others present at the time, or on the occupier of the house, while registration of marriage is enforced by making it a condition of legal validity. The principal modern Acts on the subject are those of 1836 and 1874.

On the other hand, the laws for compelling attendance

at church or permitted meeting-house (p. 79), having long been practically disregarded, were repealed in 1846.

Oath of Allegiance.—The duty of taking this oath when required, and of acting in the meantime according to the tenor of it, in which all other positive absolute duties may be said to be comprehended, remains as before, but the oath itself has undergone several changes in the direction of simplicity and generality, and is now as follows:—"I, A B, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs, and successors, according to law. So help me God."

CHAPTER III.

CHANGES IN THE LAW AS TO WRONGS AND REMEDIES.

I. CIVIL REMEDIES AND PUNISHMENTS.

Civil Remedies.—The coarse rule, that compensation must always be pecuniary, remains nearly as it was in the days of Blackstone; the only concession to Bentham's view being that in one case, that of a newspaper libel, a public apology, *coupled with a pecuniary payment*, is now allowed to bar an action.

It is still the general rule that a civil action cannot be brought in respect of a felony, until the felon has been convicted (p. 60), but its operation has become less mischievous since all forfeitures were abolished by an Act of 1870, so that there is a chance of obtaining compensation after conviction, either by a regular civil action or by a special application under the Act. An exception to the rule had previously been introduced in 1845, by one of Lord Campbell's Acts, which will be noticed elsewhere.

Punishments (see p. 61).—Drawing, quartering, and beheading remained part of the sentence for high treason till 1870, though no heads had been seen on London Bridge since 1745. Dissection of a murderer's body was made optional in 1832, and abolished in 1860. Hanging in chains was abolished in 1834. In 1868, owing to a conviction which had long been gaining

strength, that a public execution did more harm by brutalising the spectators than good by its deterrent effect, it was enacted that all executions should in future take place within the prison, in the presence of certain functionaries, and of such relatives, newspaper reporters, &c., as the Sheriff should think proper to admit. The fact that an execution is going on is usually notified to the public by hoisting a black flag on the walls of the prison.

And here it will be well to give a connected view of the steps by which, from 1825 downwards, capital punishment was gradually restricted within its present limits, instead of noticing each separately in conjunction with the offence.

1832. Stealing horses and cattle declared not capital; also forgery, except as to wills and transfer of stock.

1833. Housebreaking.

1834. Return from transportation.

1835. Letter-stealing and sacrilege.

1837. Forgery, in the cases excepted in 1832.

Rioters remaining an hour after proclamation (p. 72).

Rescuing convicted murderer.

Inciting to mutiny.

Smuggling with arms.

Kidnapping slaves.

1841. Counterfeiting marks of quality on gold and silver.

Embezzlement by a servant of the Bank of England.

Riotous demolition of churches and houses.

Rape.

1861. Shooting or wounding with intent to do grievous bodily harm.

Certain injuries with intent to murder

Firing dockyards, &c.

(High treason and murder are still capital.)

The pillory was entirely done away with in the first

year of Victoria; the stocks were generally superseded by the treadmill about 1820, without being formally abolished.

Whipping.—The punishment of whipping has had a more chequered history. During a long period, commencing some years before the death of Bentham, the current of opinion among statesmen and legislators set steadily against it, with such effect that in 1860, when the criminal law was consolidated, it was almost entirely confined, as regards civilians, to boys under sixteen. The last thirteen years have seen a partial reaction on the subject. One dark November an alarm was raised, in London more especially, that robbery with violence was on the increase, and in 1863 an Act was passed authorising the infliction of one, two, or three whippings on *garotters*, as they began to be called. The sentence is carried out within the walls of the prison, under much the same conditions as to publicity as a capital execution. A detailed description is usually published in the newspapers, and we must hope meets the eyes of those whom it is intended to frighten, and the worst offenders, who happen to be in the prison at the time, are sometimes required to be present. The severity of the punishment, which may extend to fifty lashes, is unquestionable; its efficiency has been the subject of much controversy. The recent report of a majority of the judges in favour of its continuance and extension to all crimes of brutal violence, *wife-beating* included, must be admitted to be weighty, though not decisive. On the other hand, as to corporal punishment in the army and navy, the advance towards abolition has been slower, but there has been no reaction. Whereas at the commencement of the century even 1000 lashes were not by any means an unheard-of punishment, and Bentham's own studies were continually disturbed by the shrieks of soldiers being punished in the neighbouring barracks, cor-

poral punishment can now be inflicted only in time of war, and on soldiers in active service; on sailors, who may be considered to be always on active service when they are on board ship, it can be inflicted only after previous degradation to a second class; and it can never, in either case, exceed fifty lashes.

Prisons.—Capital and afflictive punishments having been reduced within very narrow limits, the chief burden was thrown on the restrictive and compulsory punishments. If it had not been said, it had evidently been felt in many quarters, that the strongest argument for retaining the old practice of wholesale hanging was the extreme difficulty of knowing how otherwise to deal with the graver class of crimes. The evils of our home gaols, and of our transportation system, had both been effectually exposed, as we have seen. Bentham's plan of a penitentiary had been tried in name at Millbank, but with the omission of nearly all the most characteristic features, in a building erected on an unhealthy site at an enormous cost. In 1825, by the same Act which converted transportation from a temporary, half-illegal make-shift into a permanent institution, an instalment of prison reform was introduced in the shape of rules for the classification and separation of prisoners according to age, sex, and crime. In 1834 a step was taken towards uniformity of prison management by vesting the power of framing regulations in the Home Secretary, instead of the judges on circuit, and an Act of 1839 fixed the maximum term of imprisonment at three years, and that of solitary confinement in a bare cell—as a punishment for prison offences—at one month at a time, and three months in the year. In 1838 a separate prison for young offenders was established at Parkhurst in the Isle of Wight. In 1842 a new system was tried of *separate* confinement, not, like *solitary* con-

finement, as an exceptional severity, but simply as a means of preventing the prisoners from corrupting each other, and making each more accessible to religious and moral influences. The system was carried farther at the new prison built at Pentonville, where prisoners, specially selected as promising subjects, were sought to be reformed by two or three years of entire seclusion, with little or no labour, considerable physical comfort, and abundant instruction previously to starting as colonists in Australia. Experience showed that to keep human beings away from the possibility of doing either right or wrong is not the way to fit them to do their duty on their return to active life.

Meanwhile the problem of prison management was becoming even more pressing than before, since signs appeared that the alternative resource of transportation might not be always available. Sentences of transportation for seven years had long been a sham,—it not being worth the cost to take a man to the other side of the globe if he was to be brought back after so short an interval. The convict was usually first subjected to separate confinement with instruction, &c., at Millbank or Pentonville; then put through a preliminary course of hard work, in association with others, in one of the new convict establishments at Portland and Dartmoor; and lastly, if well-conducted, sent out to Australia, but when there allowed to go at large, under a revocable licence, and earn his own living, which would, it was hoped, lead to his permanent settlement in an honest course of life. In the cases to which transportation was found applicable at all it was considered not to work badly, as ultimately regulated, though in the time of early carelessness and inexperience it had resulted in frightful abuses of all kinds, which had very nearly caused its abandonment.

What did at last put a stop to it, very much against the wish of most English statesmen at the time, was the determination of the colonies, now grown into numerous, wealthy, self-governing, and self-respecting communities, not to allow any further addition of so questionable an element to their population. The only exception was Western Australia, which could only receive a small part of the numbers which had hitherto been annually transported. There was, therefore, nothing for it but to keep our criminals at home, and make the best of them.

Penal Servitude and Tickets of Leave.—The system now adopted, under an Act of 1853, was that of *penal servitude*, by which was meant enforced work at Portland, Dartmoor, or Bermuda, generally preceded by a term of imprisonment with separate confinement. The sentences were now fixed at shorter terms than those for transportation, and the convicts were encouraged to make a decent show of obedience and industry by the hope of being let out before the expiration of their sentence on *ticket of leave*, to be forfeited in case of misconduct. Unfortunately, since their detection in any subsequent offence was almost certain to involve a sentence as long as, or longer than, the unexpired part of their original term, the forfeiture of the licence had no terrors for them, and before long the country was alarmed by a remarkable increase of serious offences committed by “ticket of leave men.” Methods were then adopted for keeping the convict out on leave under stricter supervision, requiring him, among other things, to report himself monthly to the police. This rule again was for a time relaxed on the ground that it made the convict a marked man, and prevented him from obtaining employment, but was afterwards re-enacted with modifications.

Habitual Criminals.—In 1869 a new experiment

was tried at the instance of Lord Kimberley, of subjecting "habitual criminals"—defined as those who had been twice convicted of any serious offence—to perpetual police supervision after the expiration of their sentence, requiring them to notify to the police every change of residence, and reversing in their case the time honoured rule that a man is presumed to be innocent till he is proved to be guilty. This Act was repealed, but re-enacted in a different form in 1871; a definite term of police supervision, following on a period of imprisonment or penal servitude, may now be made part of the sentence on an "habitual criminal." At the same time the Legislature adopted a measure long and earnestly recommended by Bentham, of keeping a register of convicted criminals, with all possible means of identification, including one which had not been invented in his time, viz., photography.

General Remarks.—With the result of all these various experiments few persons profess to be satisfied. The problem is still earnestly debated, and in 1872 a congress met in London to compare the views and experiences of philanthropists of all nations. To suggest anything fresh on the subject would be quite beyond our province; but it is not so to remark, that in England at least no trial has yet been given to the most essential parts of Bentham's system, viz., (1), work stimulated by both punishment and reward up to the point at which it would really pay the cost of the establishment, the expenses of prosecution, and perhaps also compensation to the persons injured by the crime; (2), free admission of visitors, in order at once to stimulate improvement, to check abuses, and to increase the deterrent effect of the punishment.

Technical Classification of Offences.—*Benefit of clergy* having been finally abolished in 1827, the punish-

ment of treason having been stripped of all its peculiar terrors, felony no longer involving either death (except in the case of murder) or forfeiture of goods, and misdemeanors involving sometimes penal servitude for five years, while felonies are often disposed of in a light and summary fashion by a police magistrate, the old division of crimes into "treasons, felonies, and misdemeanors," has lost all the little utility it ever possessed, though it is still marked by a difference in the form of oath administered to the jury, and by certain irrational distinctions incidentally connected with arrest and with accidental homicide.

II. PUBLIC WRONGS.

Attacks upon the Person of the Sovereign.—

In 1842, an insane attempt to frighten or injure the young Queen Victoria led to the passing of a statute providing a suitable punishment for such acts in cases not sufficiently grave to be dealt with as high treason, namely, penal servitude for not more than seven, or imprisonment for not more than three years, coupled with whipping. The Act has since been put in force once only, in the case of a boy named O'Connor, who in 1871 presented an unloaded pistol at the Queen, in hopes of frightening her into signing an order for the release of the Fenian convicts; and in that case the whipping was remitted by the special request of Her Majesty.¹

Treason-Felony.—On the other hand, the Irish rebellion of 1848, coming at a time when England had fairly entered upon a policy of conciliation, and was not at all disposed to engender fresh hatreds by inflicting the full penalties of high treason, led to the passing of 11 and 12 Vict. c. 12, by which the Act of George III., convert-

¹ The boy is now under treatment as a lunatic, though that plea was set up in vain at the trial.

ing the purely political offences formerly treated as "constructive" treasons into actual statutory treasons (p. 69), was repealed as to that part, and such offences were made felonies only, punishable at the utmost with penal servitude for life; actual attempts to murder the sovereign, and actual levying war, remaining high treason as before. One of the insurgents sentenced under this milder law rose afterwards to be prime minister in one of the Australian colonies, and returned to Ireland to preach loyalty to a younger generation. The insurgents of 1868 were dealt with partly under this law, partly as ordinary murderers.

Foreign Enlistment.—In the American civil war (1861–1865) the existing law of this country, based on 59 Geo. III. c. 69, was found difficult to work so as to preserve an impartial neutrality according to the rules of international law, as was shown when, after one ship of war, partially equipped for the purpose in an English dockyard, had started on a career of depredation against a friendly nation, the Government vainly endeavoured to justify in an English court of law their seizure of two other ships whose destination was notoriously the same. Hence "The Foreign Enlistment Act, 1870," under which, among other things, a ship of war built or equipped for the use of a belligerent is liable to be forfeited.

Offences against Public Tranquillity.—Of the "Six Acts" mentioned at p. 168, the first is still law, modified by the easy terms on which the formation of volunteer corps has been authorised since 1859. Those relating to the seizure of arms and public meetings expired as we have seen; those affecting the freedom of the press remained substantially unaltered till 1869, when they were repealed in company with several other statutes of a similar tendency.

Offences against Public Justice.—A person may now be convicted of perjury, or at least of an offence punishable as perjury, in a great number of cases under modern statutes without taking any *oath*, since modern feeling has run strongly in favour of restricting the use of oaths, and dispensing with them altogether whenever they are not in accordance with the religious convictions of the witness.

Coins, Weights, and Measures.—*Coinage offences* are now entirely separated from the law of treason, and regulated by one of the six Criminal Law Consolidation Acts of 1861. The maximum punishment is penal servitude for life. With regard to *false weights and measures*, in 1859 it was made penal to sell, even openly and with full notice, by any measures of capacity other than the imperial ones fixed by that statute; an exception was afterwards introduced in favour of persons who might prefer to use the metric system, a privilege which seems to be seldom exercised.

Protection of Health.—Increased attention to *wrongs affecting the community at large* (p. 80) has been a special characteristic of the present generation. The course of modern sanitary legislation, commencing, so far as general measures are concerned, with the cholera years of 1848–9, though it belongs mainly to a department of law not included in the present work, has of course involved incidentally the creation of a great number of new offences which we cannot stop to particularise. The progress of manufacturing industry, necessitating many processes more conducive to wealth than agreeable to eye, ear, or nose (besides polluting rivers and spoiling vegetation), and coinciding with the rapid growth of the metropolis and other large cities, has given a great deal of work to the Courts both criminal and civil, both of Common Law and

Equity, in adjusting delicate questions of right between the community and the individual, and also between public interests of different kinds. Thus the law of *nuisance* has attained a degree of importance quite unknown to Blackstone. The *adulteration of food* was raised from a private to a public wrong (in other words, made punishable without proof that any individual had suffered) as to flour and bread in 1836, as to all articles of food and drink in 1860. By an Act of 1872 the law has been made considerably more stringent, and detection has been facilitated by the appointment of public analysts; but some modification of this last statute seems to be generally expected.

Street Music.—On the other hand, we have an instance of a wrong which could formerly be dealt with only as an offence affecting the community at large, or else by a civil action, but which may now be punished by the magistrate on complaint of an individual sufferer, in the Acts of 1839 and 1864 for regulating *street music within the metropolis*, under the latter of which any London householder may require an organ-grinder or other itinerant musician to desist from playing to his annoyance, on pain of fine and imprisonment, whereas formerly it was necessary to prove in support of the indictment that the noise was generally disliked by the neighbourhood.

Other Offences affecting the Community.—The imaginary offences of *forestalling, engrossing, and regrating* (p. 81), with some others, were removed from the statute-book in 1844,—an earnest, as it were, of the approaching repeal of the corn laws.

An Act giving extensive powers to the police for the suppression of the traffic in *obscene literature* was passed at the instance of Lord Campbell in 1857.²

² As to Sunday trading and entertainments, see Appendix.

The curious list of *unlawful games* mentioned at p. 82 was quietly effaced in 1845. *Gambling*, on the other hand, is still so far unlawful that it is a punishable offence to provide any public facilities for it; and of late years our legislators and administrators have striven hard to cope with the ingenuity which is constantly devising new methods of evasion. A constant source of difficulty is the fact that the rich can always gamble to their hearts' content without any public facilities, so as to give plausibility to the cry, "One law for the rich and another for the poor." The State abolished its own lotteries in 1826, and was thus enabled without inconsistency to enforce the already existing laws against other lotteries; but one harmless form, that of Art Unions, in which the subscribers draw lots for works of art, has since been specially exempted.

Moreover, several sports, which our ancestors either permitted or connived at, have of late been vigorously repressed as brutalising and immoral. As to *prize-fighting*, for instance, the alteration has not been in the law, for it was always unlawful to be either a combatant or a spectator, but in its enforcement, which has only become serious and effective within the last ten or fifteen years, since the nobility and gentry ceased to patronise the sport.

Cruelty to Animals.—But the case was different as to sports of which the brutality was directed only against the inferior animals. To deal with these required not merely a new law but an entirely new principle of legislation, which was not admitted without considerable hesitation. The first enactment bearing on this subject was passed in 1822. It applied only to the cruel and improper treatment of beasts of burden and cattle. In 1833 an Act was passed for prohibiting bear-baiting, cock-fighting, &c., but only within five miles of Temple Bar, and it was put

solely on the ground of the tendency of those amusements to produce idleness, disorder, and annoyance to the public. In 1835 an Act was passed which reduced the penalty for ill-treatment of cattle, but prohibited bear-baiting and similar pastimes universally, and also contained provisions against the starving of impounded animals, and for the regulation of slaughter-houses. This is the first Act which plainly asserts in its preamble the duty to prevent cruelty as such, reciting that "many and great cruelties are practised to the great and needless increase of the sufferings of dumb animals, and to the demoralisation of the people,"—though it is careful to add, lest these should not be thought adequate grounds for legislation,— "and whereby the lives and property of His Majesty's subjects are greatly endangered and injured." In 1849 the protection of the law was extended to *any animal*. In the debate on that Act Lord Redesdale stood up in the House of Lords to defend cock-fighting, "when fairly and properly conducted." In 1854 an enactment was applied to the whole kingdom, which had already been fifteen years in force for London, prohibiting the use of dogs for purposes of draught. Before quitting this subject it is worth while to remark, that the law as it now stands contains no definition of cruelty, and applies to all animals alike, so that fox-hunting, battue-shooting, fishing, or steeple-chasing might be effectually suppressed without any change in the law, if at any time public opinion should so far change that individuals could be found to prosecute, and magistrates and juries to convict. A charge was actually entertained not long ago for excessive use of the spur in a horse-race, but the fact was held not to be proved. The question, how far *vivisection* of animals for scientific purposes should be permitted by law, is at present (1875) under the consideration of Parliament.

III. PRIVATE WRONGS.

Wrongs affecting Life.—The old Common Law rules as to homicide remain unaltered; the Indian Penal Code of 1860 set us an example of a more rational definition, avoiding the absurdity noticed at p. 84, but no attempt has been made to follow it in this country. Murder is now, with the almost nominal exception of high treason, the only offence which can be capitally punished under the general law of the land; and even in this case the sentence is often mitigated in an irregular fashion by the exercise of the pardoning power of the Crown through the Home Secretary. Bentham used to say that the pardoning power was never necessary unless the law was bad, in which case it should be altered instead of being retained and violated; as he came ultimately to condemn capital punishment *in toto*, he would doubtless have looked upon the present practice as confirming his opinion. The uncompromising severity of the law, which always refused to see any difference between *duelling* and ordinary murder, has for the last fifty years or so had public opinion in its favour, to such an extent that the practice is now almost unknown among us, while it is rife in almost every other Christian country. The more lenient view which Bentham took of it is reflected in the Indian Penal Code, which makes it only “culpable homicide of the second degree” like our “manslaughter.” The Forfeiture Abolition Act of 1870 has incidentally abolished the only part of the old law as to *suicide* (p. 86) which was likely to have any substantial deterrent effect. The spread of the railway system, with its large percentage of fatal accidents, brought into greater prominence than before the want, noticed at p. 87, of a *civil remedy for homicide*,—a want which was supplied in 1846 by Lord

Campbell's Act, under which an action for compensation may be brought on behalf of the wife, husband, parent, or child of a person whose death has been caused by the fault, whether actually criminal or not, of another person.

Attempts to Commit Murder (see p. 87, *note*).—"This monstrous omission in the law," says a modern writer, "is now supplied in the most characteristic manner. Four sections of the 24 and 25 Vict. c. 100, specify as many as ten or twelve ways of attempting to commit murder, on all of which the same punishment is inflicted. The following section allots the same punishment to attempts to commit murder by any other means than those specified in the preceding sections" (J. F. Stephen, *General View of the Criminal Law*, p. 123). And here, perhaps, is the place to notice a controversy which arose some forty years earlier with regard to what we may call a *general attempt* to murder or do grievous bodily harm, by means of *man-traps and spring-guns*. In 1820 a strange doubt was expressed by several judges whether a landowner might not be justified in setting such deadly engines in his game-preserves for their protection against trespassers,—an incident in legal history which has been rendered memorable by a scathing article by Sydney Smith. The Legislature was at last, in 1827, induced so far to interfere as to declare the act a misdemeanor, without any specified punishment, practically therefore punishable at the utmost with two years' imprisonment, without hard labour. The punishment has since been extended to five years' penal servitude; and, of course, if death is actually caused by such means, it is now manslaughter at the least (p. 84), and murder if the setter of the engine had reason to expect such a result.

Wrongs affecting the Body, but not Life.—The

more serious offences of this class ceased to be capital in 1861, and now come under certain ill-drawn and complicated clauses in one of the consolidating Acts of that year, the effect of which is, however, that most kinds of *grievous bodily harm* intentionally inflicted may entail, as the maximum punishment, penal servitude for life. Such a case as that to which Fonblanque drew public attention in 1847, where a man broke the bones of his wife's nose, and struck her on the head with his fist till she became insensible, and remained so for two days, but could only be convicted of a *common assault*, for want of evidence that any *instrument* had been used, cannot now occur. This decision will appear still more striking if it is remembered that not until 1861 could hard labour be added to simple imprisonment for a common assault,—so great was the tenderness of English law to that favourite national weapon, the fist.

False Imprisonment.—To the general rule in favour of the personal liberty of individuals neither convicted nor accused of crime, some few exceptions have been admitted in connection with our modern attempts to legislate against disease and pauperism; some just and necessary, others exceedingly questionable, but which cannot be here discussed. The Habeas Corpus Acts have been suspended several times in Ireland, but never in England since 1817.

Wrongs affecting Reputation.—The decline of duelling may possibly be attributed in part to improvements in the legal remedies for wrongs of this kind, for which a challenge had formerly been the unpleasant and expensive substitute. A sum of money is no longer quite the only legal salve for wounded honour. In the first place, the wide publication through the press of all legal proceedings makes the verdict itself in a civil action

for libel or slander much more like the "attestatory satisfaction" which Bentham recommended; in the next place, the threat of it may be used as a means of extorting a public apology, and direct encouragement has been given to this use, or rather a discouragement to the more sordid use of it, by an Act of 1843 (one of Lord Campbell's), which provides that the fact of an apology having been offered before the commencement of the action may be pleaded in mitigation of damages. The same Act also prescribes a process of mixed apology and compensation by which a newspaper proprietor may save himself from liability to an action for a libel inserted in his paper without his knowledge.

In the criminal part of the law of libel we are indebted to the same legislator, and indeed to the same statute, for a still more important improvement. It had been a maxim of the lawyers, that on a *criminal* indictment "the greater the truth the greater the libel;" the truer it was, the more likely it was to stick and sting, the more likely, therefore, to disturb the peace of society, which was the gist of the offence. But in Lord Campbell's time the world had come to perceive that such peace might be too dearly bought by the social impunity of blackguards, especially since the heroic remedy of the duel could no longer be resorted to for their repression. It had come very much to agree with Bentham, that the "public-opinion-tribunal," as he delighted to call it, required to be in every way strengthened and purified, as the best corrective to all moral evils, and the only possible corrective to many against which the magistrate was powerless. Expression was given to this view of the matter by the enactment, that a person indicted for libel may allege the truth of the matters charged therein, as in a civil action, but that the truth "shall not amount to

a defence, unless it was for the public benefit that the said matters charged should be published."

Wrongs affecting Property—Theft.—It would be tedious to enumerate the successive enactments, each the effect of "wisdom after the fact," by which the eccentric gaps in the law of larceny, both as to the kinds of things which could be the subject of it, and the acts which constituted it (p. 90), were gradually filled up. Most of them were passed either previous to 1861, or in the Act of that year, whereby the whole law on the subject was consolidated. The only later addition of importance is an Act of 1868, making it theft in a partner to steal the partnership property. As the law now stands, though the general rule is that real property cannot be stolen, every sort of real property has been excepted which is at all likely to be stolen. Similar "exceptions" include, or are intended to include, all *documents of title* which can well be stolen. Dogs are specially provided for by one section; while cats, parrots, and other pets, are protected by another as "animals kept for a domestic purpose." We may have the comfort of feeling assured that if any new kind of theft should be invented which cannot be brought under any of the existing provisions, another will be added, and possibly some day we may have them all included in some such comprehensive definition as that of the Indian Penal Code: "whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking." The general punishment for simple larceny is now penal servitude for five years or imprisonment for two years, with or without hard labour and solitary confinement, and, in the case of boys under sixteen, with or without whipping. Being a felony, it

involved also, down to 1870, forfeiture of goods. The distinction between *grand* and *petty* larceny had been abolished; but, on the other hand, larcenies under five shillings, larcenies where the defender pleads guilty, and larcenies by children under fourteen, may be punished in a much lighter manner under the summary jurisdiction of magistrates.

Burglary.—The definition of this, the most aggravated form of theft, which continued to be a capital offence (if committed by armed men) so late as 1861, and is now punishable with penal servitude for life, was extended by the Act of that year so as to include breaking out of a dwelling-house at night, after having either actually committed a felony in it, or entered it with intent to do so, whereas the essence of the offence at Common Law was the *breaking and entering*. The term *night*, which had given rise to much hair-splitting, was in 1837 defined to mean the time from 9 P.M. to 6 A.M.

Game Laws.—We find on this subject an exception to the generally lenient tendency of modern legislation; the increasing prevalence of large game-preserving, offering continually stronger and stronger temptations to the poacher, has necessitated laws of ever-increasing stringency to counteract those temptations. See statutes 9 Geo. IV. c. 69; 7 and 8 Vict. c. 29; 25 and 26 Vict. c. 114; to these we may add the 1 and 2 William IV. c. 32, which, by vesting the property in game when killed in the person having the right to kill and take the game upon the land (p. 187), incidentally subjects the poacher to the ordinary punishment for larceny. It is not clear how a species of property so difficult to identify and to protect can ever be other than a source of discomfort both to the owner and to his neighbours.

Personation.—Under the head of *misappropriation*

by deceit, we noticed in our first part the great severity with which the forgery of *written documents*, employed as a means of obtaining property, was treated in comparison with other forms of cheating, a severity which is still relatively, though not absolutely, as great as before. The reasons for this distinction, whatever they may be, must apparently apply with about equal force to the forgery of a man's *personal identity* for a similar purpose; and on this principle the Legislature seems to have proceeded, though in a most partial and capricious manner, when in 1828 one not peculiarly atrocious form of the offence,—namely, personating a *soldier* to obtain his pay or prize-money—was made a felony punishable, whether *successful or unsuccessful*, with transportation for life. In 1865 personating a *seaman* for a similar purpose (a crime one would think of precisely equal moral character) was made a misdemeanor, punishable with five years' penal servitude. Before that, in 1861, personation in order to obtain a transfer of *stock or shares* had been made punishable (successful or unsuccessful) with penal servitude for life. At last the famous Tichborne trial reminded us that these are by no means the only objectionable modes of personation, and an Act of 1874 makes *all* personation in order to obtain any property (successful or unsuccessful) punishable with penal servitude for life. The apparently irrational confounding of the attempt with the completed offence is perhaps rendered innocuous by the wide discretion left to the judge. Otherwise, looking merely to the letter of the law, there would be nothing to deter any future "claimant" from any amount of perjury, forgery, or foul charges against innocent persons, when he had once taken the first step in his career of imposture.

The civil remedies for misappropriation of property have

undergone no change of special interest; neither have the remedies, civil or criminal, for injuries to property.

Breach of Contract.—The criminal consequences which formerly followed a breach of contract of *service* (p. 97) were, by an Act passed in 1867 for one year, but renewed year after year down to the present time, limited to—(1), cases of aggravated misconduct; (2), cases in which money ordered to be paid in compensation (either by master or servant) has not been paid, and cannot be recovered by way of distress; and (3), cases in which *an express judicial order to fulfil the contract has been disobeyed*. This last case is especially noticeable as an extension of the power of enforcing *specific performance* of a contract, hitherto the peculiar prerogative of the Court of Chancery, and exercised even by that Court only in a few cases. No other breach of contract is now criminally punishable; and a Government Bill now before Parliament proposes to punish such only as cause serious injury to the public in certain specified ways.

CHAPTER IV.

CHANGES IN THE LAWS RELATING TO PROCEDURE AND EVIDENCE.

I. CONSTITUTION OF THE COURTS.

Bentham's Scheme.—On the whole, looking back over the achievements in this department of the last fifty years, and forward to the changes which may with some confidence be expected, we shall find that there is no part of English law which has been so completely revolutionised, and none which seems so thoroughly impregnated with the mind of Bentham, as that which forms the subject of the present chapter. If we set ourselves to trace shortly the fate of each separate portion of his great scheme of reform, we shall come first, according to the order previously adopted (p. 151), to the Judicial Establishment.

County Courts.—The reader will remember that Bentham had constantly advocated the substitution of local "single-seated" tribunals with universal jurisdiction, for the system prevailing in his time of Courts either centralised or itinerant, with the responsibility divided between two or more judges, dealing only with certain kinds of cases, and even with those only after the preliminary work had been done by others; this plan, however, found very little favour in his lifetime. The *Courts of Requests*, which were the only models he could point to, were too jealously weakened and kept down to become really effi-

cient, and were then scouted for their inefficiency; though, in spite of all drawbacks, so urgent was the need felt for something of the kind, that forty-six new ones were established between 1801 and 1846 (making 100 in all) by separate Acts of Parliament, for particular localities, at the special request of the inhabitants. In 1833, however, a general system of local Courts, for small debts only, was recommended by a Royal Commission; several abortive attempts were made in successive years to carry this recommendation into effect, which was at last done by the Act of 1846, introduced by Lord Cottenham as Lord Chancellor. Under this Act the jurisdiction of the new Courts was limited to Common Law cases, where the sum in dispute was not more than £20, and even as to those there were several important exceptions. The new Courts adopted the name, though not the constitution or procedure of the ancient and disused County Courts. In 1850 the limit was raised to £50, and more effectual means were taken to deter plaintiffs from bringing petty cases into the Superior Courts. In 1856 these Courts were enabled to try almost any question by consent of both parties; while, on the other hand, a case within the limits might be removed into a Superior Court at the will of the defendant on his giving security for the costs. In 1857 their jurisdiction was extended to actions relating to wills or intestacy, where the property in dispute should not exceed £200 if personal, £300 if real; in 1865 they were empowered to deal with such questions as had hitherto come into the Court of Chancery, involving any amount up to £500; and by Acts of 1868 and 1869 an *Admiralty* jurisdiction almost equally wide (as to matters arising at sea or abroad) was conferred upon those of maritime districts. (Their *Bankruptcy* jurisdiction will be noticed further on.) There are now 500 of these Courts, served

by sixty judges, each of whom sits on successive days in the different Courts which compose his circuit. He generally sits alone, according to Bentham's plan, but a jury of five may be had in most cases if asked for. The proceedings are of so simple a character, that it is seldom necessary to employ even an attorney, much less a barrister. Larger proposals in the direction of localisation or civil tribunals have been much discussed of late.

Local Criminal Courts.—We have seen that for criminal purposes the necessity of the case had caused the localising principle to be applied much earlier, notwithstanding serious objections on the score of danger to liberty, through the gradual extension given to the *summary jurisdiction* of two or more Justices of the Peace in Petty Sessions, in addition to the more ancient and respectable jurisdiction of the Quarter Sessions. Of course, with every addition to the powers and responsibilities of these magistrates, every deficiency in their intellectual and moral qualifications came to be more keenly noted and seriously felt; the more so as the people had at every assizes the opportunity of comparing "Justices' justice" with that dealt out by the best trained intellects in England. The "Great Unpaid" became, justly or unjustly, a byeword for ignorance, rashness, and class prejudice. A remedy was sought in the employment, in London and in other populous places where the inhabitants expressed a desire for them, of trained lawyers as *stipendiary magistrates*; and here also Bentham's maxim of undivided responsibility was followed by enacting that one stipendiary magistrate should have all the powers vested in *two or more* of the unpaid at Petty Sessions. The first district for which such a magistrate was appointed was that of the Staffordshire Potteries, in 1839.

Superior Courts of Common Law.—In the con-

stitution of these tribunals, the only important changes have been the extension, in 1830, of the English Circuit system into Wales; the creation at the same time of three additional judges, one for each Court, and of three more in 1868, the latter increase being a consequence of the new jurisdiction conferred upon them for the trial of *election petitions*, formerly heard by the House of Commons itself; and lastly, the creation, in 1834, of a new *Central Criminal Court* for offences committed in the metropolis and certain parts adjoining, and also for offences committed at sea or abroad, which is presided over by any of the superior judges who happen to be disengaged, in conjunction with certain other officials.

Chancery Courts.—In regard to the Court of Chancery there has been more innovation. The appointment, already noticed (p. 164), of a Vice-Chancellor, in 1813, proved quite inadequate as a remedy for the evils complained of. In 1841, when the Equity side of the Exchequer Court was abolished, two more Vice-Chancellors were added, also sitting separately, making, with the Master of the Rolls, four distinct Equity Courts of original jurisdiction, and leaving to the Lord Chancellor only an appellate jurisdiction intermediate between these and the ultimate appeal to the House of Lords. In 1851 the appellate Court was strengthened by the addition of two *Lords Justices*, who sit together either with or without the Lord Chancellor.

Bankruptcy Courts.—Down to 1831 this class of business was entrusted to commissioners appointed separately for each case by the Lord Chancellor. A number of permanent commissioners were appointed in that year for the London districts, and afterwards for country districts also, each of whom could act separately, when once set in motion by the *fiat* of the Lord Chancellor, but

subject to the control, first of a *Court of Review in Bankruptcy*, and afterwards of one of the Vice-Chancellors. This arrangement was considerably modified in 1861, and still further in 1869; the commissioners being all abolished, the country business being transferred to the County Courts, and the London bankruptcies being administered by a Court presided over by a Chief Judge.

Ecclesiastical Courts.—In 1857 the Ecclesiastical Courts were shorn of their most important functions. Their jurisdiction (p. 120) as to wills and as to the distribution of personal property on intestacy was transferred to a new *Court of Probate*, a subordinate jurisdiction being vested, as we have seen, in the County Courts; while that relating to matters between husband and wife was given to the closely connected *Court for Divorce and Matrimonial Causes*. They have thus been reduced nearly to the level of Courts Martial, dealing only with clergymen of the Established Church in their professional character, as those Courts deal with soldiers and sailors; and as such they no longer concern us.

High Court of Admiralty.—On the other hand, this Court received in 1861 an enlarged jurisdiction, and now ranks on an equality with the Superior Courts of Common Law and Equity.

Supreme Courts of Appeal.—It was a critical moment in the history of the *House of Lords* as a judicial body, when the case of the Irish agitator O'Connell came before them on appeal from a conviction for sedition (1844). Several of the lay peers, who could not bear to see a man whom they considered so dangerous escape punishment on a purely technical point, expressed an intention of voting; but it was strongly pressed upon them, that by custom, though not by strict law, the judicial functions of the House had long been discharged exclu-

sively by the peers who were, or had been, judges, and that in no other way could its decisions be kept consistent, and command respect. They withdrew, and left the matter to the *Law Lords*, who decided in favour of O'Connell; and from that time no attempt has been made to infringe the important principle then asserted; which is, indeed, the only condition on which such a Court of appeal as the House of Lords could possibly be tolerated.

As the *Law Lords* are to the House of Lords, so is the *Judicial Committee of the Privy Council*, as remodelled in 1833, to the whole of the anomalous body described as the *Queen in Council*, which is nominally the supreme Court of Appeal from the Ecclesiastical, Admiralty, and Colonial Courts.

II. RULES OF PROCEDURE.

Fusion of Common Law and Equity.—Before examining the unconnected improvements which have been from time to time effected in the procedure under each of the rival systems, it will be convenient to mark the steps by which, while continuing to be administered in distinct sets of Courts, they have nevertheless been gradually assimilated, each in turn borrowing the characteristic methods of the other. Thus,

Common Law has borrowed from Equity—

Written interrogatories (p. 119).

Powers of compelling either party to disclose, and offer for inspection any relevant documents in his possession (*ibid.*)

Injunction to prevent the continuance of a wrong or breach of contract (p. 96).

Permission to plead certain matters by way of defence, which formerly could only have been made use of in Equity as grounds for an injunction to stay the proceedings at law (p. 120).

All these new powers were given by the *Common Law Procedure Act of 1854*. By the same Act provision was made for dispensing with trial by jury in civil actions at Common Law, in all cases with, and in some cases even without, the consent of both parties.

On the other hand, Equity has borrowed from the Common Law, under the *Chancery Amendment Act of 1858*, and the *Chancery Regulation Act of 1862*—

Trial by jury (optional in certain cases, but not often resorted to).

Oral examination of witnesses in open court.

Assessment of damages for wrong or breach of contract.

Besides which the Court of Chancery is now bound, as a rule, to determine any question of law which arises before it incidentally, instead of sending it to be tried at Westminster.

Further Fusion in Prospect.—But all these tentative measures are soon to be superseded by an entirely new system, created by the *Judicature Act of 1873*—the operation of which has, however, been postponed till the autumn of 1875. One Supreme Court of Appeal is to take the place of the House of Lords and the Judicial Committee of the Privy Council; below which there is to be one High Court of Justice, of which the existing Superior Courts of Equity and Common Law, including the Courts of Assize and Nisi Prius, will be considered as merely convenient divisions for the despatch of business, the same methods of procedure being available for each and all as occasion may require, and each being empowered to determine every question of fact, law, or equity, which may arise out of the case before it; though, to begin with, suits are to be initiated in that branch which, according to the old division, would be most appropriate. So far as the substantive rules of law

and equity differ, the latter are, of course, to prevail as they have done heretofore. The "fusion" is still so far incomplete that parties will have to distinguish in their *pleadings* (p. 116) between their rights at law and in equity, though both will be adjusted by the same tribunal, and in the same suit.

Simplification of Procedure.—Independently of fusion, a steady course of improvement, chiefly in the direction indicated by the above heading, has been going on for some forty years and more in the Courts both of Common Law and Equity. We have not space for more than a few salient points.

Courts of Common Law—Civil Procedure.

The celebrated speech of Lord (then Mr) Brougham in the House of Commons in 1828, which by the way was very far from giving satisfaction to Bentham, whose disciple he was generally proud to call himself.

First, second, and third reports of the Law Commission (1831, 1851, 1853).

The Common Law Procedure Acts of 1852, 1854, and 1860, mostly based on those reports, the general effect of which has been to remove unnecessary formalities, to enable the plaintiff to choose his form of action at a later stage in the process, and to enable mistakes in the form of the pleadings to be cured in almost every case by *leave to amend*, of course at the expense of the party in fault.

Limitation, in 1869, of *arrest before judgment* to the cases in which it is absolutely necessary for the ends of justice.

Criminal Procedure.

Similar liberty of amending the indictment, and disregard of unimportant variances (p. 111).

Thorough remodelling and consolidation of the rules for procedure of magistrates in the exercise of their *summary jurisdiction*, and also in their *preliminary examination* of persons accused of graver offences, previous to their committal for regular trial at Quarter-Sessions or Assizes, by two Acts passed in 1848, and known as "Jervis's Acts."

Prisoner allowed to be defended by counsel on charge of felony (p. 107), though still only at his own expense (1836).

To the above alterations already effected, we may add the fact that *Grand Juries* have been known of late, in one or two instances, actually to "present" that their own abolition would be a public benefit,—an indication, as we may conjecture, that their fate will not be very long delayed.

Equity Procedure.—The principal changes in this department bear date as follows:—

1850: *Sir G. Turner's Act*, enabling parties amicably disposed, but doubtful about their rights, to agree upon a *special case* to be submitted for the opinion of the court.

1852: (1.) *The Master in Chancery Abolition Act*, putting a great deal of responsible work, hitherto left to a subordinate official, under the immediate superintendence of the judge—a partial application of Bentham's principle, according to which every step in the inquiry should be personally directed by the individual responsible for the final decision.

(2.) *The Improvement of Jurisdiction of Equity Act*, containing a variety of innovations as to the form of the bill of complaint, and other written statements of the parties to a suit, and as to the proceedings in Court.

1860: (1.) *The Chancery Evidence Commission Act*, empowering the Lord Chancellor, with the advice of the other Chancery judges, to frame new rules for taking

evidence in Chancery suits—the general principles, however, being laid down for them by Parliament.

(2.) *The Consolidated Orders of the Court of Chancery*, being the rules framed in compliance with the last-mentioned Act, under the direction of Lord Campbell as Lord Chancellor.

1872: Transfer to the Paymaster of the Treasury of the moneys, amounting collectively to about twenty-two millions, which the Court of Chancery finds it convenient to take charge of, from time to time, in connection with pending suits. The Court has thus, in fact, constituted the Government its banker.

Trial by Jury.—We have reserved to the last this crowning glory, as it has generally been thought, of our English procedure. Of its past history, during the short period with which alone we are concerned, there is very little to be said. We have seen already how its application has been restricted in one direction and extended in another; withdrawn, in favour of the summary jurisdiction of magistrates, from an increasing number of minor offences, or what are supposed to be such; dispensed with in civil cases by consent of both parties, and sometimes refused to them under the system of compulsory reference; but on the other hand extended, at least permissively, upwards into the Courts of Equity and downwards into the new County Courts. The internal mechanism of the institution is still not very different from what Blackstone described. The qualifications and grounds of exemption for jurors were resettled in 1826, again in 1863, and again in 1870; the tendency of each successive change being, on the whole, rather to contract than to expand the area from which jurymen have to be drawn. The rule that the jury were to be confined without food, drink, candle, or fire, till they could agree upon a unanimous verdict, described by

Bentham as "perjury enforced by torture," has been set aside without express enactment, and the modern practice in such a case is to discharge the jury and grant a new trial. But the requirement of unanimity is still retained; its abandonment was recommended by the Common Law Commissioners above mentioned, and the experiment seems to have been approved in India after ten years' trial, but the old English practice is still not without strong arguments in its favour and able defenders. The remuneration of jurors has been somewhat increased of late, but great complaints are still made of hardship to those who are compelled to attend, and of frequent evasions of the duty.

It has become quite a trite saying that "trial by jury is itself on its trial," and a time seems to have come when its principle should either be definitively abandoned, which would be a step of extreme gravity, or be much more thoroughly and impartially carried out.

Rules of Evidence.—In this, the subject of the best-known and most elaborate of all Bentham's works, the progress of his principles has also been the most remarkable. Our legislation has tended steadily, though slowly, to remove one by one the artificial restrictions placed by the old law on the natural methods for discovery of truth. The very spirit of our reformer breathes in the preamble to the 6 and 7 Vict. c. 85 (1843), commonly known as *Lord Denman's Act*:—"Whereas, the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony," &c.

The Act goes on to declare that no witness shall thereafter be excluded by reason of incapacity from *crime* or *interest*. This was not quite the first step in that direction; as early as 1828 it had been enacted that on a charge of forgery the parties interested in the forgery being proved might give evidence, and, on the other hand, that a person convicted of misdemeanor only should not be disqualified from giving evidence; and in 1833 an interested person was allowed to give evidence in an action, subject to the condition that he should not make use of the judgment to support his own case in any subsequent litigation.

The policy thus begun has since been much more thoroughly carried out. In 1846 the parties to actions in the new County Courts were allowed to give evidence on their own behalf, and in 1851 the same rule was applied to proceedings in the Superior Courts. In 1853 husbands and wives were permitted to testify for or against each other in civil actions; and in 1869 the permission was extended to proceedings in the Divorce Court and trials for breach of promise of marriage, but not to criminal trials. So again with regard to the exclusions connected with religious belief or unbelief. In 1833 Quakers, Moravians, and Separatists were allowed to *affirm* instead of swearing. An Act of 1837, which did little more than confirm the doctrine of *Omichund v. Barker* (p. 101), enacted that all persons should be bound by oaths taken in such form as they should declare to be binding on their consciences. The law still required that the witness should believe both in a God and in a future state of rewards and punishments; and further, that he should either take an oath, or else declare that he belonged to one of the Christian sects which had a conscientious—by which was meant a Scriptural—objection to doing so. Some very hard cases arose under

this state of the law; and at last, in 1869, any witness was allowed to dispense with the oath on declaring that it would have no binding effect on his conscience. Several other rules of exclusion, however, which Bentham attacked with similar arguments and equal confidence, still retain their place in our system; the rules which protect the accused in a criminal trial from interrogation, and any witness from answers which would criminate him, have been abolished in India, though not in England; but the privilege of secrecy accorded to confidential communications between husband and wife is still retained in both systems. So is the rule against hearsay, though the list of exceptions has received some additions in England and more in India.

Plea of "Not Guilty."—Bentham's arguments against the practice of judges dissuading a prisoner from pleading guilty when he is disposed to do so, were repeated and popularised after his death by Albany Fonblanque and others; but the practice still continues, and is defended on the ground that the plea of "not guilty" is really neither given nor taken as a protestation of innocence, but is only a form of demanding regular inquiry and strict proof. It is said also that if this were not done a person conscious of having done wrong, and not knowing exactly what constituted the legal offence charged against him, might plead "guilty" where he ought not to be convicted. The reader will judge for himself whether this end might not be attained by less questionable means.

Privileges of Counsel.—Here again we commence with Fonblanque in tracing a series of emphatic protests on behalf of the public against the immorality of advocates solemnly affirming their personal conviction of the innocence of a client whom they know to be guilty, or endeavouring to shield him by directing groundless sus-

picion against innocent persons. The trenchant remedy of Bentham, who wished to put both counsel and attorney into the witness-box, and examine them as to what they knew about the case, has not been adopted; but increased publicity seems to have wrought some, though far from sufficient improvement in the tone of the bar on the subject.

CHAPTER V.

CHANGES IN THE LAWS AFFECTING SPECIAL CLASSES OF PERSONS.

I. DISABILITIES FROM CREED AND NATIONALITY.

Dissenters from the Established Church.—The fortunes of these bodies would have claimed our attention long before this point if we had still been following the simple chronological order. For it was by the struggles for the emancipation of Protestant dissenters and Roman Catholics that the long sleep of the reforming spirit was first broken,—even earlier than any serious effort was made for the improvement of the constitution. Those struggles, however, fill so large a space in general history, that the merely legal historian must be contented briefly to note the results.

Relief Acts of 1828-9.—The slight relaxations of 1812 and 1813 have been already noticed (p. 164). In 1828 came the repeal of the Test and Corporation Acts, whereby almost all civil and military employments, including a seat in either House of Parliament, were thrown open to Protestant dissenters. In 1829 the "Catholic Relief Act" released the adherents of the old religion from a great part of the much more serious disabilities and positive penalties by which they had been oppressed for nearly three centuries.

Dissenters' Marriages.—In 1836 the right of

solemnising marriage without the intervention of the State Church, already allowed, for different reasons, to Quakers and Jews, was extended to dissenters of all kinds, Roman Catholics included. Marriage may now be either concluded as a purely civil transaction in the registrar's office, or be solemnised with any religious ceremony preferred by the parties, provided the proceedings take place in the presence of the registrar in a building generally used for worship and duly certified for the purpose, and provided that the service include the legal words constituting the civil contract.

Roman Catholics and Jews.—In 1832 Roman Catholics were placed on a level with Protestant dissenters in respect of their schools, churches, and charitable institutions, and also in respect of the property held in trust for such purposes. In 1846 the same legal status was accorded to Jewish endowments; and, partly in that year, partly in 1844, a clean sweep was made of all the remaining Acts directed against Roman Catholics which the Relief Act of 1829 had left in existence, perhaps from inadvertence, owing to their being practically obsolete. The measures taken in 1858 for the relief of the Jews from their political disabilities belong rather to constitutional history; and the same may be said of all our subsequent legislation in relation to religious nonconformity, except the admission (above noticed) of the testimony of atheists.

Aliens.—The law prohibiting aliens from acquiring a permanent interest in land, a law common to England with many other states, had been censured by Bentham as going much further than public policy required, since the only case in which danger could accrue would be where the land was situated near the frontier. His view has at last been acted upon without his restriction,

which has hardly any application to a state whose frontier is the sea. By the *Naturalisation Act*, 1870, aliens are allowed to hold real and personal property of every description anywhere within the United Kingdom. The same Act gives additional facilities for aliens to become British subjects, and also, what is more novel and important, enables British subjects to become aliens, abrogating the old Common Law rule, *Nemo potest exuere patriam*. It also abolishes the privilege of aliens to be tried by a mixed jury of Englishmen and foreigners.

II. DISABILITIES FROM SEX, INFANCY, AND INCAPACITY.

Women.—Confining our view to private law, for with the political disabilities of the sex we are not here concerned, we have seen already how the sex obtained, in the reign of George IV., the privilege of exemption from the punishment of whipping. In all other punishments—since the abolition of the peculiar severities of the law of treason—the *sentences* on women and men are now exactly the same, though their *treatment*, in prisons and convict establishments, is necessarily somewhat different. In assault cases it is now (since 1853) made a specific ground of aggravation that the sufferer is a woman or a child under fourteen.

Exclusion from Employment.—The above seem to be still the only differences recognised by the law to the advantage of the weaker sex, unless it is a real advantage to women to be prohibited from doing work which is supposed to be unsuitable to them,—a question keenly debated at the present time. As regards the *professions*, the exclusion of women is usually defended—not so much in their own interest, as in that of the public—on the ground either of their presumed unfitness for the duties, or of some inconvenience which might be caused to the other sex from

their admission to the preliminary courses of instruction. As to these, the situation is substantially the same as in the last century, namely, that from nearly all those professions, the terms of admission to which are regulated by public bodies specially recognised by the State, viz., those of barristers, attorneys, surgeons, physicians, and university teachers, women are excluded by the action of such public bodies, not by direct legislation. Certain women were a few years ago admitted to the medical profession, owing to the absence of any express rule to the contrary, but a rule was forthwith made to prevent other women from following their example. They can, however, obtain certificates as apothecaries. Recently, also, one of the national universities, that of London, has admitted women to its degrees. From office in the State Church they are excluded by the Canon Law, which is part of the law of the land; from the direct service of the State in other departments chiefly by mere custom, which has of late been in several instances relaxed. Their exclusion from certain *unskilled* employments, and the restrictions placed, or proposed to be placed, on the time and mode of their working in others, are really advocated on the ground of their need for protection against *their own* excessive desire to earn an independent livelihood. It is sought, however, to bring their exclusion within the principle already applied in the Factory Acts, to be presently noticed, of protecting young children against the excessive haste of *their parents* to make them contribute to the subsistence of the family. Women were for the first time in 1844 reduced to the level of "young persons" for the purpose of these Acts, and a similar clause has been inserted in most of the subsequent statutes. Their employment in mines had been prohibited somewhat earlier.

Children.—The general presumption being that a child is in the charge of some parent or legal guardian, most enactments for their protection naturally take the form of duties attached to those personal relations. But some laws which affect children simply as such may properly be noticed here. In their *property* rights the only changes at all noticeable are, a clause in the Wills' Act of 1837, which sweeps away certain abnormal cases, in which a will could be made by a person under twenty-one, and a rather absurd Act of 1874, which prohibits an adult from ratifying a contract made by him when under age. The protection of their *persons* first occurs as a subject of legislation in 1812 (p. 164), but it was in 1833 that the main struggle took place between the philanthropists and the political economists, the decision of which in favour of the former led to the long series of *Factory Acts*, *Chimney Sweepers' Acts*, and the like, addressed partly, no doubt, to parents, but chiefly to employers of labour, which give effect in various ways to the principle that the physical powers of children are not to be used by their elders for money-getting purposes in any way which will interrupt the natural growth of their bodies and minds, or prevent their receiving a certain minimum of artificial cultivation. Even to enumerate, much more to describe, these Acts, would be a most formidable task, quite beyond the scope of the present work.

Juvenile Offenders.—Considering children as objects of punishment, the judicial treatment of them on different principles from those applied to adults seems, strange to say, to be almost an original invention of the present generation. The modern alterations have been partly in the direction of increased tenderness to juvenile offenders, partly the reverse. Their separation from full-grown

criminals within the prison walls, strongly advocated by Howard in 1777, was prescribed by law in 1784, but seems to have been quite the exception in practice until thirty or forty years later. The establishment of a separate prison for them in 1838 (p. 225) was the first distinct recognition by the State of a duty in their case to reform as well as to punish. Since 1854 a fuller effect has been given to that view through the system of *Reformatory Schools*. These are schools established by private enterprise, though subject to State supervision. Offenders under sixteen may be sent to them after a short term of imprisonment, and kept there for several years at the expense of their parents. As a complement to these we have the Industrial School, to which magistrates are empowered to send children not actually convicted of crime, but found homeless, or begging, or whose parents are criminal or obviously unfit to take care of them. On the other hand, partly by the removal of corporal punishment from a number of adult offences to which it was formerly attached, partly by express addition in the course of the reaction above mentioned, liability to that punishment has come to be looked upon, to a far greater extent than formerly, as a legal incident peculiar to boyhood, applicable to boys under sixteen after the verdict of a jury in a regular trial, to boys under fourteen in a milder form, under the summary sentence of a police magistrate. A maximum limit in the latter case, of twelve strokes with a birch rod, was fixed in 1862, in consequence of strong representations as to the thoughtless exercise by some magistrates of the arbitrary discretion formerly vested in them. If the extent to which functions are specialised be, in politics as in physiology, the measure of the perfection of an organism, even these changes seem to leave us somewhat behind the republics of ancient Greece, which em-

ployed separate officers (*παιδονόμοι*) to deal, on different principles, with juvenile disputes and delinquencies.

Lunatics.—An Act introduced by Mr Gordon in 1828, and renewed from time to time till 1845, effected great improvements in the system of licensing private asylums, imposing much stricter conditions on the granting and renewing of licences, and on the reception of patients, and providing for regular visitation, and discharge of patients found to be of sound mind. The system was worked by a body of commissioners, partly physicians and partly barristers, appointed by the Lord Chancellor. In 1845, by an Act introduced by the present Lord Shaftesbury (then Lord Ashley), and supported by the Government of Sir Robert Peel, the system was further elaborated, and placed on a more permanent footing. In 1853 (by 16 and 17 Vict. c. 96) several new provisions were added, especially as to single patients, and these two Acts form the basis of the present law, so far as regards the private care of lunatics *not so found by inquisition* (*v. infra*). That law may be stated generally as follows:—It is unlawful to receive more than one lunatic into an unlicensed house. No person can be received into a licensed house without a written order from the nearest male relative who is accessible, and a certificate in the prescribed form from two medical men. The licences are granted for London and the surrounding districts by the *Commissioners in Lunacy*, for other places by the magistrates of the county in Quarter Sessions. Visitors appointed by the same authorities are to inspect frequently, at unexpected times, and in certain cases even by night, and report to the commissioners, who report to the Lord Chancellor. Generally speaking, the commissioners have power to release any person for whose detention no sufficient cause is established to their satisfaction. A single

lunatic may be kept by an unlicensed person without any regular supervision, if the keeper be either a *committee* appointed by the Lord Chancellor, or a person deriving no profit from the charge; otherwise he can only be received on such order and certificate as above described, and subject to regular and frequent visitation. Notwithstanding all these precautions, cases of wrongful confinement are still asserted to occur, and an association exists for promoting further reforms in the Lunacy Laws.

Inquisition of Lunacy (p. 125).—The system of conducting these inquiries was revised in 1833, but it is now regulated by two more recent "Lunacy Regulation Acts," one of 1853 (16 and 17 Vict. c. 70), the other of 1862. Instead of a special commission for each case, the inquiry, when ordered by the Lord Chancellor or the Lords Justices, is conducted by one or both of two *Masters in Lunacy*, with or without a jury according to circumstances. It is still the law, as it was in Blackstone's time, that a person who is not mad enough to be found a lunatic by inquisition, and put under personal restraint, cannot in any way be debarred from the management of his property, however large it may be, and however unfit he may be to make a good use of it.

Pauper Lunatics.—By another statute of 1853 (16 and 17 Vict. c. 97), every county and borough throughout the kingdom is required to provide an asylum for its pauper lunatics. Down to that time the law had made no distinction between them and other paupers, and when the workhouse system was introduced in 1834, that was the only place in which they could be received. The visitors of these public asylums are elected by the magistrates from among their own body, but are under the control of the Commissioners in Lunacy.

Criminal Lunatics.—Till 1800, if the defence of

lunacy was pleaded to a criminal charge, and established to the satisfaction of the jury, they simply gave a general verdict of acquittal, and a distinct proceeding was necessary in order to confine the prisoner as an ordinary lunatic. In that year it was enacted that the jury should distinctly state whether the insanity was the ground of acquittal, and that in that case the prisoner should be detained in strict custody until His Majesty's pleasure should be known. But it was not till 1860 that a separate asylum was established for criminals of this class.

III. TRADES, PROFESSIONS, AND EMPLOYMENTS.

The Licensing System, according to which the carrying on of a business, which, in default of special precautions may be dangerous to the public welfare, is permitted only under special licence from some public authority—the conditions of granting and forfeiting such licence being, of course, prescribed by law—has been applied very widely in the present century. The danger alleged as the ground for such an interference is sometimes to the morals, sometimes to the bodily health and safety, sometimes to the property of the community. And first of the trades licensed as *morally* dangerous.

Sale of Intoxicating Liquors.—The connection between intoxication and crime is so obvious, that those who, however innocently, provide the means of intoxication, have usually been looked upon with extreme jealousy by zealous moralists and legislators. Total prohibition has been tried elsewhere, and has not been without its advocates in England; but the Legislature has hitherto always taken the middle course of treating the traffic as legitimate but dangerous, and therefore to be licensed and regulated, though the nature of the regulations has

varied considerably, the changes in the law during the last forty-six years averaging about one in three and a half years. The "many wholesome statutes, chiefly of the reign of James I.," noticed by Blackstone, were in 1828 consolidated into one with considerable modifications, but retaining the general principle that the retail liquor-traffic should be limited to keepers of regular houses of refreshment holding renewable and forfeitable licences from the collective magistracy of the county or borough. In 1830, in consequence of frequent complaints as to the partial and arbitrary exercise of this power, the experiment was tried of drawing a line between beer and spirits, and allowing entire freedom to the sale of the former, subject to a mere excise licence, in hopes of discouraging the more pernicious form of drinking; but the consequent multiplication of small beershops was set down, justly or unjustly, as the cause of all manner of social mischief, and in 1834 the sale of beer "to be consumed on the premises" was again put under restriction—the condition being a certificate from six resident ratepayers unconnected with the trade. In 1840 a very singular method of protecting morality was resorted to, that of making the sale of beer by retail a privilege of the comparatively wealthy, a certain rating being taken as the test of "respectability;" later Acts have not only retained the principle, but raised the rating. In 1860 an Act was introduced by Mr Gladstone, as Chancellor of the Exchequer, which aimed, as he expressed it, at "connecting the business of eating with that of drinking," and also at setting up cheap wine as a rival to spirits. Accordingly, it enabled the keepers of *eating-houses* to sell foreign wine by retail with a mere excise licence, and without any application to the magistrates; while *refreshment houses*, i.e., houses open after nine (afterwards ten) at night, were to require a magis-

terial licence, and be subject to special police control, whether they sold any intoxicating liquor or not, and were to be allowed to take out a wine licence with little or no additional trouble. Side by side with this ceaseless manipulation of the licensing system, there has been a course of experiments, as it were, to determine the most suitable hours for closing public-houses and places of refreshment. The oscillations as to the nocturnal limit are of no particular interest, but the rules for closing during certain hours of Sunday deserve notice on account of the constant difficulty in applying the exception always inserted in such Acts for the benefit of *travellers*,—an appellation which it was found necessary to concede to that large part of the population who take long walks or short railway excursions on a Sunday. In 1872 the whole law on the subject was remodelled by a comprehensive Act, which provoked vehement discussion, which is said to have had no small share in bringing about the fall of the Ministry which proposed it, but which, after full consideration by a new Parliament and a new Ministry, has been allowed to remain on the statute-book with a few modifications not seriously affecting its main principles. Those principles are—(1), to make the licensed publican more strictly responsible for drunkenness and disorder on the part of his customers, and punishable for supplying liquor to a child or to a person already drunk—such responsibility being enforced by giving greater powers of inspection to the police, but also a power of summary expulsion to the publican himself; (2), to make the licences grantable as before by the borough and county magistrates (excluding those connected with the trade), but on stricter conditions, and more easily forfeitable—the house itself, as well as the individual occupier, being in some cases put under a ban for two years; (3), to encourage the entire

closing of public-houses on Sunday by granting *six-day licences* at a reduced charge; (4), special penalties on adulteration of intoxicating liquors, with rather inquisitorial powers for its detection; (5), an ascending scale of penalties on successive convictions for drunkenness in a public place or building, with summary arrest and imprisonment with hard labour for being drunk and riotous, or drunk while riding or driving, or while in possession of loaded fire-arms.

The most important modifications introduced in 1874 are—(1), that adulteration by publicans is left to the general laws on that subject; (2), that the magistrates are on the one hand deprived of their discretionary power to grant special exemptions from the hours of closing, but on the other hand obtain a still more arbitrary power of putting a district under one or the other set of regulations, according as they may or not choose to define it as a *town* or *populous place*; (3), that a *bona fide traveller* is so far defined that he must be at least three miles distant from the place where he lodged on the preceding night.

Public Entertainments.—By the law as revised in 1843, all theatres must still be authorised, in London and some other places, either by royal patent or by the Lord Chamberlain, and elsewhere by the magistrates in special session, and may be closed at any time by the same authorities; and all plays wherever acted must be submitted before performance to the censorship of the Lord Chamberlain; but his power of excision was limited, at the instance of Lord Campbell, to matters likely to produce either a breach of decorum or a breach of the peace. This anomalous jurisdiction of the Lord Chamberlain being confined to *dramatic* performances, the drawing of a line between what is and what is not *dramatic* has naturally given some trouble to the Courts.

Two other employments which have recently been brought under the licensing system, chiefly, as it would seem, on account of danger to morals, are that of the master of an *agricultural gang* (1867) and that of *keeper of a common lodging-house* (1851 and 1853), though considerations of bodily health and safety entered also into both cases.

Danger to Person and Property.—Among employments licensed on account of danger to bodily health and safety, we have—(1), those connected with combustible and explosive substances, such as gunpowder, petroleum, and nitro-glycerine; (2), the sale of drugs and poisons; (3), employments connected with public locomotion, such as those of omnibus conductors, cabmen, and watermen, mostly under municipal regulations, and those of pilots and officers of merchant-ships, under the Merchant Shipping Acts of 1854 and 1872; (4), the care of young children. The licensing of all these employments, with the exception of the third class, is mostly of very recent introduction. The practice of medicine and surgery is not exactly a licensed profession, the only consequence of practising without regular authorisation being the inability to recover fees in a Court of Law.

The *Pedlars Acts* of 1870 and 1871 afford a recent, and, it is believed, a solitary example of bringing a simple and apparently harmless occupation under the licensing system on the ground of a danger which is not likely at the worst to affect anything but property.

Other Special Regulations.—Short of the stringent precaution of licensing—*i.e.*, prohibiting all who are not licensed—there are several ways in which an occupation may be made the subject of special legislation. It may be taxed, either simply for financial reasons or in order to discourage it; the mode of working may be regulated

by law under penalties, as in the *Mines Acts* of 1842 and 1872, or the *Passengers Act*, 1855; and such penalties may be enforced either by a system of inspection, as in the instances mentioned, or by rewards to informers, or may be left to chance. Or again, a scale of charges may be fixed, as by the numerous Acts affecting pawnbrokers, ranging from 1789 to 1872; or the usual presumption as to innocence may be reversed in the case of a suspicious trade, as in the *Old Metal Dealers Act* of 1861; or the members may be simply required to register themselves, as in the case of newspaper proprietors, under the *Copy-right Acts*. A perusal of the titles of recent volumes of the statute-books will show that in all these ways legislative activity is decidedly on the increase.

IV. CORPORATIONS AND COMPANIES.

Commercial Associations.—The obstructions described at p. 127 were not likely to be long endured at a time when the progress of science offered so many new openings for large undertakings, and when the spirit of association was so strong as it has been during the last fifty years or thereabouts. The *Bubble Act* was repealed in 1825. In 1834 the expedient was adopted of allowing the Crown to create by *letters-patent* a species of qualified incorporation, under which the individual members should be personally liable for the debts of the whole body. Another plan often resorted to was to obtain a special Act of Parliament, either incorporating the company in the qualified manner just described, or rendering the members liable only to the extent of their shares not paid up, or not incorporating them at all, but merely empowering them to sue and be sued by a public officer, in which case the individual liability was always unlimited. In 1844 a general Act was passed enabling all companies

to acquire this status by complying with certain conditions, and registering themselves in an office in London. A similar privilege had been allowed to banking companies since 1826, but was withdrawn, strange to say, in that same year, 1844. An Act of the same year made certain arrangements for the winding-up of bankrupt companies, which were altered in 1848 and 1849, jurisdiction for that purpose being given to the Court of Chancery.

Limited Liability.—In 1855 a new and important principle was introduced; companies registered under the Act of 1844 (other than insurance companies) were enabled to obtain incorporation with *limited liability*. Further extensive alterations were made by Acts of 1856 and 1857; these, however, were themselves repealed by the *Companies Act*, 1862, which, with an amending Act of 1867, constitutes the basis of the present law relating to joint-stock companies incorporated simply by registration. Any seven or more persons, associated for a lawful purpose, may now, by registering themselves according to law, form an incorporated company, with or without limited liability. In the former case, public notice of the limitation is secured by the requirement that the word "Limited" must for all purposes form part of the name of the company. Membership is constituted by signing the *memorandum of association*, which must contain among other things a statement of the objects of the company, the amount of its capital, and the number of shares into which it is divided. The matters contained in this memorandum of association cannot be altered, but the Act provides a method by which in other respects the constitution and regulations of a company may be altered by a majority of its members. Provision is also made for the winding-up of companies, either compulsorily or voluntarily.

Companies Incorporated by Special Act of Parliament.—This is a process now only resorted to where the undertaking involves interference with private property, and the anticipated public benefit is thought sufficient to justify such interference. Companies of this kind have to some extent a history of their own. Such *special Acts* are now always made to be read as if incorporated with the two general Acts of 1845, already referred to as the *Lands Clauses Act* and the *Companies Clauses Act* (p. 175), and also, if the nature of the undertaking require it, the *Railways Clauses Consolidation Act* of the same year. All these have since been modified and extended, but not altered in principle.

Insurance Companies have so far a separate history that they were not allowed to register themselves as limited companies till 1862, and that Life Assurance Companies were, by an Act passed in 1870, put under stricter regulations than other joint-stock companies as to publication of their accounts and principles of management. The reason for the difference is the vital interest which the most quiet, industrious, and unspeculative part of the community has in their stability.

Friendly Societies.—Non-commercial associations generally were not excluded from the operation of the Act of 1862, but had no need to avail themselves of it, since, not being partnerships, the liability of their members is *ipso facto* limited to the sums they have promised to contribute, and the contracts which they have expressly or impliedly authorised; while their permanent property, if any, is usually vested in a small number of the members as trustees. There are, however, certain associations which are formed, not exactly for gain, but for the mutual insurance of the members or their families against certain probable contingencies of special expense, such as burial.

sickness, or the birth of a child. Such are *benefit building societies*, *friendly societies*, and *industrial and provident societies*. The obvious importance of these societies in encouraging habits of industry and economy, coupled with the great variety of opinions as to the proper limits of State interference in such matters, fully accounts for the number of enactments which have been passed in relation to them, since the first legal recognition of them in 1793. In 1855 the law on the subject was consolidated, and all former Acts repealed; the Act of that year has been several times amended, though not yet repealed, and we are promised a new and comprehensive measure based on the recent report of a Royal Commission. The plan hitherto followed has been to make the rules of such societies legally enforceable if, and only if, they have been registered, which they cannot be unless certified as conforming to certain principles.

V. PERSONAL RELATIONS.

Husband and Wife.—The changes in the mode of solemnising marriages, having been directed solely to the removal of religious disabilities, have been noticed under that head (p. 258). The state of things during the marriage did not, even in Blackstone's time, require any formal alteration as regards the wife's legal immunity from personal violence, but only better enforcement of what was already understood to be the law, an object still very imperfectly attained, and for which sterner measures are, as we have seen (p. 224), at present under consideration. As regards the wife's property rights, the first changes were rather for her husband's advantage than for her own,—namely, the change already mentioned as to dower (p. 206), and the power given by the same Act of alienating her real estate (and under an Act

of 1857 her reversionary interest in personalty), with the concurrence of her husband by *acknowledging* the deed in presence of some judicial officer. The first change in her favour was the introduction in 1857 of the system of *protection orders*, under which a wife deserted by her husband without reasonable cause might keep and enjoy her own earnings and acquisitions as if she were unmarried. This provision has now been superseded by an Act of 1870, slightly altered in 1874, which secures to the wife, even while living with her husband, the full ownership of all her own earnings since the marriage. She can keep all moneys invested by her before marriage in almost any kind of public security (public funds, shares in companies, savings' banks, friendly societies, &c.), also all such investments made during the marriage either with her own moneys, or with moneys properly belonging to her husband with his permission; also any personal property, and the rents and profits of any real property, which she may inherit from an intestate relative during the marriage, and any legacy, or sum given her by deed, not exceeding £200. Her power of making binding contracts, and of suing and being sued in her own name, is of course co-extensive with her legal ownership. *Divorce* was admitted in 1857 as a regular part of our legal system, and a new Court established to administer it. But this relief is still limited to the case of simple adultery on the part of the wife, or adultery coupled with cruelty or desertion, or with certain special aggravations, on the part of the husband; and it is practically still almost an exclusive privilege of the upper and middle classes, being obtainable only in the one Court at Westminster, and at a great expense. The same may be said of *judicial separation*, which the same Court is empowered to grant in much the same way as the old

Ecclesiastical Courts used to grant *separation from bed and board*, though in contingencies more precisely defined.

Perhaps the most important of all the newly-acquired rights of the wife are those which we have now to notice under the next head.

Parent and Child.—Under the old law, as we have seen, *parent* meant for almost every purpose the father only. But by the Infants' Custody Act of 1839 ("Talfourd's Act") the Court of Chancery was empowered, if it saw good reason for so doing, to give the custody of a child under seven years to the mother in preference to the father. In 1873 the limit of age was raised to sixteen, and agreements contained in a separation-deed that the mother should have the custody of the children were declared to be no longer *ipso facto* void, though they may still be set aside if the Court considers them not for the benefit of the infant. On the other hand, the obligation to maintain an illegitimate child, which by the old law was imposed exclusively on the mother, was by the Poor Law of 1834 extended to the father also; and in 1839 this relief was brought more practically within the reach of the unfortunate mother, by allowing such *affiliation orders* to be made in a summary way at Petty Sessions.

In addition to the Common Law obligation of the parent to maintain his child, and the negative duties imposed in some cases by the Factory and similar Acts, two new positive duties have of late been thrown upon him,—to *vaccinate* and to *educate*. The former was made compulsory in 1867, the latter in 1870.

Master and Servant.—The legislation which has removed almost every difference between this relationship and one of pure contract has already been noticed under the latter head.

CONCLUSION.

We have now passed in review a century of legal changes, or rather half a century of stagnation followed by half a century of innovation;—innovation greater in the aggregate than that effected in Roman law during the three centuries between the age of the Antonines and that of Justinian, under a series of absolute emperors, with frequent changes of dynasty, changes of population, and an entire change of religion. Not that the greatness of the innovations would be anything to boast of, unless they were also for the better; but that they were so in the main—in other words, that a return to the state of the law described by Blackstone would be a grievous calamity—is seldom or never seriously disputed. If, in the account of this mighty transformation, it appears to the reader that the name of one man has been introduced with too wearisome iteration, let him consider that in no other way could the true moral of the story have been effectually set before him. That moral may be taken to be as follows. The systematic improvement of the law, like most other things really great and useful, requires singleness of purpose in those who would devote themselves to it. It is not a pursuit which can be taken up with much prospect of a solid result by successful barristers in the intervals of business, by members of Parliament and Cabinet Ministers who owe their position to their prominent activity about the two or three measures just then engrossing public attention, still less by journalists expressing rapid judgments, daily or weekly, on events as they occur. It will happen, of course, that, as each reform reaches its completion and takes its place in the statute-book, it will be stamped and connected in the mind of the public with the name of an individual belonging to one or other of these classes. But

it is seldom the actors most conspicuous in the *dénouement* who have had most to do with bringing it about. The "statesman" can do no more than advocate on platforms and in the Legislature some cause which has already taken a considerable hold of the public mind. If he attempts to originate anything for which the minds of the people are not prepared, it will take him the best part of a life-time before he can expect to effect a change in the sentiments of thirty millions, and his career as a statesman will be a hopeless one. Whatever may have been the case in the little republics of Greece and Italy, in the great states of modern times, division of labour is absolutely indispensable. But the first part of the work is that for which it is by far the most difficult to find labourers. There is never any lack of men who want to be members of Parliament, Cabinet Ministers, or Lord Chancellors, and who will earn their promotion by carrying on the routine as it is, or by supporting one side or the other in questions ripe for settlement. When once a proposed reform has reached that stage, it is sure of being keenly debated by the best ability in the country, and is likely to be ultimately settled in accordance with the deliberate conviction of the people. But it is only at rare intervals in history that any thorough reform is initiated, or that any really good law is passed, by anything but a lucky accident. Generally speaking, legislation has in all countries been directed rather at symptoms than at causes, and has been quite as likely as not to open a new sore while closing an old one. That the legislation of this century has been in some degree an exception, that amidst all its shortcomings and inconsistencies there is traceable something which is not mere quackery, something like a clear perception of the true conditions of health in the body politic, is due mainly to the presence of one new element—to the faithful labours,

prolonged over more than half a century, of one man who dared to sit still and think, while others were acting at random, who dared to believe that law is capable of scientific treatment. What Socrates did for moral philosophy, what Adam Smith did for political economy, that Bentham did, so far as England is concerned, for jurisprudence.

The problem now is, how to secure a succession of such men, and how so to prepare the soil for them that they may sow their seed to good purpose, and that if possible it may take somewhat less than fifty years to ripen. That Bentham's ripened at all was due to a combination of lucky accidents. Our second great scientific jurist,¹ who promised to supply us with that first condition of sound thinking on any subject, a well-chosen and carefully-defined terminology, was baffled throughout his career by insufficient means and general discouragement, and left little more than a heap of unsightly, though precious fragments. The third of the line,² who opened out a different field, that of historical and comparative jurisprudence, has received his due meed of honour, and has been enabled to do important legislative work, not indeed for England, but for a dependency where things may (and must) move faster, while at home his work as a teacher may in the long run prove not less fruitful in results.

But one in a generation, which has hitherto been about the rate of production, or at least of recognition, is really not a sufficient supply to meet the demand. Unless a very different proportion can be established in future between the thinkers and the workers, the work will be, as before, aimless, botchy, superficial. The balance may partly be redressed by artificial means. The measures recently adopted in the direction of improved professional education for bar students, compulsory examination as a con-

¹ Mr Austin.

² Sir Henry Maine.

dition for being called to the bar, and special rewards offered for those branches of legal study which are least likely to produce their own reward in the shape of early professional success,—all these are good in themselves. Another hopeful sign is the increased attention paid to the combined study of Roman law, English law, and general jurisprudence, at the three English universities. A still more hopeful sign would be the adoption of these subjects, which might easily be done with improved text-books, into the ordinary curriculum of our great public schools. Much might also be done at the other end of the ladder by the creation of a department of Government specially charged with the duty, not of administering the law, but of watching its administration with a view to proposing amendments both in its form and in its substance, a branch of which department would naturally deal with the subject of *codification*.

But, after all, our main reliance must be on the individual energy and self-devotion of the rising generation. This little work will have amply repaid to its author the trouble of its composition, if it has the effect of inspiring one single youth of the right stamp to give himself to such a career as that here depicted. His work may be expected to be much easier than it was in the days of Bentham. He will come to the task equipped with a much better thinking apparatus than the wretched university education of the 18th century could supply. Even the more accurate classical scholarship of the present day, much more the varied training in logic, philosophy, and natural science which is now generally accessible, will enable him, with even half the genius and perseverance of our self-taught hero, to accomplish a great deal more. It will be entirely his own fault if he does not contrive to avoid the eccentricities of style, the ignorance of other men's labours

and, it must in candour be added, the appetite for flattery, which are the common accompaniments of self-taught genius, and which caused his predecessor to waste so much time and so often to provoke antagonism without necessity. The work now to be done, though it demands the renunciation of forensic or political ambition, by no means demands such seclusion as that of Bentham, but, on the contrary, may be much better accomplished by the mutual assistance, and under the mutual correction, of many like-minded students.

APPENDIX.

LAW RELATING TO SUNDAY OBSERVANCE.

THE above subject had been but very slightly referred to in this work, and exclusively in connection with Sunday trading; but when nearly the whole was in print, the case of the Brighton Aquarium excited so strong a public interest in the other branch of the question, that of Sunday amusements, and indicated so strong a probability of further legislation, that a fuller treatment of the whole matter seemed to be imperatively required. The author has therefore removed the solitary passage relating to it from the body of the work, and incorporated it with the brief but continuous narrative which is here presented to the reader.

Not to repeat what was said as to compulsory church going (pp. 58, 221), nearly all the law as to what in Blackstone's time might *not* be done on a Sunday was contained in two old statutes, one relating to *play*, the other to *work*. The first, 1 Car. I. c. 1 (1625) prohibited the assembling of persons for sports otherwise lawful *out of their own parishes*. By the second, 29 Car. II. c. 7 (1678), no tradesman, artificer, workman, or labourer, or *other person*, was to pursue his ordinary calling on the "Lord's Day"—*works of necessity and charity only excepted*—and no person

whatever was publicly to cry or expose for sale any wares whatever except milk. Other sections of this Act, supplementing one of 1628, forbad the conveyance of goods by carriers, and the driving of cattle. Breaches of these laws were punished by small pecuniary penalties, with the alternative of the stocks.

But the legislation of the Stuarts was far outstripped in severity by an Act passed in 1781. That year will be remembered as the last of Lord North's disastrous ministry, in other words, of the personal government of George III.; and it is perhaps to that sinister influence, then being strained to the utmost in order to stave off its approaching defeat, rather than to any taste for intolerance or Puritanism in the governing classes generally, that we must attribute the passing of a measure which seems more congenial to the spirit of the 17th than to that of the 18th century. It was especially aimed at two establishments in the metropolis, one of which, called the Promenade, was simply a set of rooms in which people could walk about and converse, and take tea and coffee, without, so far as appears, any other amusement or entertainment being provided, the price of admission being three shillings; the other was a Sunday debating society, which met to discuss passages of Scripture which were selected and given out for the purpose, ladies as well as gentlemen taking part in the proceedings. The Bishop of Chester (Dr Porteous) conceived these societies to be highly dangerous, the one to morality and the other to religion, and to be "the beginnings of a regular plan to introduce Sunday diversions into this kingdom." He therefore introduced a bill for their suppression, which, though opposed by a few individuals with considerable wit and eloquence, and very feebly supported in argument, passed both Houses with scarcely a division.

The 21 Geo. III. c. 49 is entitled "An Act for preventing certain abuses and profanations on the Lord's Day, called Sunday." The preamble states that "certain houses, rooms, or places within the cities of London and Westminster, or in the neighbourhood thereof, have of late frequently been opened for public entertainment or amusement upon the evening of the Lord's Day, commonly called Sunday; and at other houses, rooms, or places, within the said cities, or in the neighbourhood thereof, under pretence of inquiring into religious doctrines, and explaining texts of Holy Scripture, debates have frequently been held on the evening of the Lord's Day, concerning divers texts of Holy Scripture, by persons unlearned and incompetent to explain the same, to the corruption of good morals and to the great encouragement of irreligion and profaneness." The Act then proceeds to impose a penalty of £200 on the keeper of any house or place which should be used on Sunday—(1) for any public entertainment or amusement; (2) for publicly debating on any subject whatever, and to which persons should be admitted by the payment of money, by bought tickets, or by subscription, or at which refreshments should be sold at a higher price than on week days; the penalty going to the informer.

The Act of 1678 as to Sunday trading still remains in force, but several new exceptions were introduced at different times, while the general exception in favour of "works of necessity and charity" has always been very liberally construed; and at last, in 1871, it was enacted that no prosecution under it should be undertaken without the sanction of some public authority; a virtual acknowledgment that its provisions can only be made enduring through frequent exceptions and relaxations. Trading, in fact, goes on in London as publicly, though not as generally, as on any other day.

With regard to Sunday *travelling*, it was decided in 1828 that stage-coaches might ply on that day, and an Act of 1832 expressly declared the same as to hackney coaches; of course railway locomotion, which began to come into general use about that time, obtained the benefit of the same exception.

As to Sunday *amusements*, the Act of 1781 has been neither repealed nor modified, but has for many years past been variously evaded. For instance, the Zoological Gardens in London have long been open every Sunday to the holders of transferable tickets issued to persons who are nominally the elected Fellows of a scientific society, but who in fact include all, or nearly all, who are willing to pay the required subscription. In 1868 this statute was invoked against the President of an Association which had organised in London a series of "Sunday Evenings for the People," consisting of sacred music, and discourses (not debates) "intended to be instructive, and containing nothing hostile to religion." The hall in which they met, and to which some were admitted by paid tickets, was registered as a place for religious worship, though no hymns were sung, nor prayers uttered at the meetings. The judges decided that this was not a "public entertainment or amusement;" and under shelter of this decision lectures wholly unconnected with religion have been delivered every Sunday afternoon for several years, to audiences admitted partly by subscribers' tickets and partly by payment at the doors. So the Act slumbered again till the present year (1875), when the question was raised whether its penalties were incurred by the admission of Sunday visitors by bought tickets to see the Brighton Aquarium, and hear a band play in its precincts. Considering that the Act was originally aimed at a mere promenade without any artificial attractions, it could not

reasonably be doubted that the exhibition of fish, with or without the music, must be a "public entertainment" within the meaning of the Act, and so it was decided in two successive actions; but the judges gave this decision with evident reluctance, and coupled it with a unanimous expression of a desire for the total or partial repeal of the Act, a sentiment which was echoed by nearly the whole of the English press.

To sum up: as the law now stands, Sunday trading is in fact permitted in all forms, though in many of its forms it might at any time be suppressed by authority; work for gain, other than the exposing of goods for sale, is only checked in the same indirect way as on a Bank holiday, though to a somewhat greater extent—namely, by stopping that part of the machinery of commerce and litigation which is directly dependent upon the Government. All amusements which are lawful on week-days are lawful also on Sundays, unless they involve either the admission of the public to some house or place upon payment of money, or the assembling of persons out of their own parishes; political and religious discussions, not being seditious or blasphemous, are as legal on Sunday as on week-days in the open air, but illegal in a place to which persons are admitted by payment; though a *speech*, or succession of speeches on the same side, to which no reply is allowed, whatever the subject and whatever the views advocated, is, as it would seem, legal even if the audience pays for it,—*unless it be entertaining or amusing.*

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Reign.	Lord Chancellors.	Date of Appointment.	Lord Chief Justices of Que. n's Bench.	Date of Appointment.
Geo. III. 1760-1820.	Lord Henley . . .	1760.	Lord Mansfield . . .	1756.
	" Camden . . .	1766.		
	Hon. C. Yorke (2 days) Commissioners . . .	1770. 1770.		
	Lord Apsley (Hon. H. Bathurst) . . .	1771.	Lord Kenyon . . .	1788.
	Lord Thurlow . . .	1778.		
	Commissioners . . .	1783.		
	Lord Thurlow (2) . . .	1783.		
	Commissioners . . .	1792.		
	Lord Loughborough . . .	1793.		
	" Eldon . . .	1801.	Sir Charles Abbott, (created Lord Ten- terden in 1827)	1818.
	" Erskine . . .	1806.		
	" Eldon (2) . . .	1807.		
Geo. IV. 1820-1830.	Lord Lyndhurst	1827.		
Wm. IV. 1830-1837.	Lord Brougham and Vaux . . .	1830.	Sir Thomas Denman (created Lord Den- man in 1834)	1832.
	Lord Lyndhurst (2) . . .	1834.		
	Commissioners . . .	1835.		
	Lord Cottenham . . .	1836.		
Victoria. 1837.	Lord Lyndhurst (3) . . .	1841.	Lord Campbell . . .	1850.
	" Cottenham (2) . . .	1846.		
	Commissioners . . .	1850.		
	Lord Truro . . .	1850.	Sir Alexander E. Cock- burn	1859.
	" St. Leonards . . .	1852.		
	" Cranworth . . .	1852.		
	" Chelmsford . . .	1858.		
	" Campbell . . .	1859.		
	" Westbury . . .	1861.		
	" Cranworth (2) . . .	1865.		
	" Chelmsford (2) . . .	1866.		
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	" Selborne . . .	1872.		
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Traité de Législation. Dumont

Bentham's Theory of Legislation, by Hildreth.

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these too far apart, and the intercourse of the defenders with an army of relief under the Count of Clermont at Blois was not broken off. Early in the following year, this army hoped to raise the siege by falling on a large body of provisions coming to the besiegers from

Battle of the Herring. Paris under Sir John Fastolf. The attack was made at Rouvray, but Fastolf had made careful preparations.

The waggons were arranged in a square, and, with the stakes of the archers, formed a fortification on which the disorderly attack of the French made but little impression. Broken in the assault, they fell an easy prey to the English, as they advanced beyond their lines. The skirmish is known by the name of the Battle of the Herring. This victory, which deprived the besieged of hope of external succour, seemed to render the capture of the city certain.

Danger of Orleans. Already at the French King's court at Chinon there was talk of a hasty withdrawal to Dauphiné, Spain, or even Scotland; when suddenly there arose one of those strange effects of enthusiasm which sometimes set all calculation at defiance.

In Domrémi, a village belonging to the duchy of Bar, the inhabitants of which, though in the midst of Lorraine, a province under Burgundian influence, were of patriotic views, lived a village maiden called Joan of Arc. The period was one of great mental excitement; as in other times of wide prevailing misery, prophecies and mystical preachings were current. Joan of Arc's mind was particularly

Joan of Arc. susceptible to such influences, and from the time she was thirteen years old, she had fancied that she heard voices, and had even seen forms, sometimes of the Archangel Michael, sometimes of St. Catherine and St. Margaret, who called her to the assistance of the Dauphin. She persuaded herself that she was destined to fulfil an old prophecy which said that the kingdom, destroyed by a woman—meaning, as she thought, Queen Isabella,—should be saved by a maiden of Lorraine. The burning of Domrémi in the summer of 1428 by a troop of Burgundians at length gave a practical form to her imaginations, and early in the following year she succeeded in persuading Robert of Baudricourt to send her, armed and accompanied by a herald, to Chinon. She there, as it is said by the wonderful knowledge she displayed, convinced the court of the truth of her mission. At all events, it was thought wise to take advantage of the infectious enthusiasm she displayed, and in April she was intrusted with an army of 6000 or 7000 men, which was to march up the river from Blois to the relief of Orleans. When she appeared upon the scene of war, she supplied exactly that element of success

of all of them open by two slits turned towards the centre of the flower. Their stalks have expanded and joined together, so as to form a thin sheath round the central column (fig. 12). The dust-

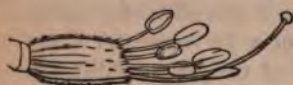


Fig. 12.
Dust-spikes of gorse (*enlarged*).

spikes are so variable in length in this flower, that it may not be possible to see that one short one comes between two long ones, though this ought to be the case.

The *seed-organ* is in the form of a longish rounded pod, with a curved neck, stretching out beyond the dust-spikes. The top of it is sticky, and if you look at a bush of gorse, you will see it projecting beyond the keel in most of the fully-blown flowers, because the neck has become more curved than in fig. 12. Cut open the pod; it contains only one cavity (not, as that of the wall-flower, two separated by a thin partition), and the grains are suspended by short cords from the top (fig. 13). These grains may be plainly seen in the seed-organ of even a young flower. It is evident that they are the most important part of the plant, as upon them depends its diffusion and multiplication. We have already seen how carefully their well-being is considered in the matter of their perfection, how even insects are pressed into their service for this purpose! Now let us glance again at our flower, and see how wonderfully contrivance is heaped upon contrivance for their protection!



Fig. 13.
Split seed-pod of gorse.

First (see fig. 10, p. 14), we have the outer covering, so covered with hairs, that it is as good for keeping out rain as a waterproof cloak; in the buttercup, when you pressed the bud, it separated into five leaves; here there are five leaves, just the same, but they are so tightly joined that you may press till the whole bud is bent without making them separate at all, and when the bud is older, they only separate into two, and continue to enfold the flower to a certain extent till it fades. When the flower pushes back its waterproof cloak, it has the additional shelter of the big

struction, and at last, after nearly twenty years of alternate hopes and fears, of tedious negotiations, official evasions, and sterile Parliamentary debates, it was effectually extinguished by the adverse report of a Parliamentary Committee, followed by the erection of the present Millbank Penitentiary at a vastly greater expense and on a totally different system.

Transportation.—In the meantime the common gaols were relieved in a makeshift fashion by working gangs of prisoners in hulks at the seaports; but the resource mainly relied on for getting rid of more dangerous criminals was the old one of transportation, Botany Bay having succeeded to America. As at first employed, there was no mistake as to the reality of the punishment; the misfortune was that the worst elements in the real were not so made known as to form any part of the apparent punishment. If the judge, in sentencing the convict, had thought fit to explain, for the warning of would-be offenders, exactly what was going to be done with their associate, the sentence would have been something of this sort: "You shall first be kept, for days or months as it may happen, in a common gaol, or in the hulks, in company with other criminals better or worse than yourself, with nothing to do, and every facility for mutual instruction in wickedness. You shall then be taken on board ship with similar associates of both sexes, crammed down between decks, under such circumstances that about one in ten of you will probably die in the course of the six months' voyage. If you survive the voyage you will either be employed as a slave in some public works, or let out as a slave to some of the few free settlers whom we have induced to go out there. In either case you will be under very little regular inspection, and will have every opportunity of indulging those natural

Relation to the Barbarians of the East 203

wealth into the treasury. Churches remained open day and night, and frequent addresses kept up the enthusiasm to a high pitch. It was (for the moment) a genuine "revival" or reawakening of the whole Roman world. The occasion, too, appeared favourable. Italy was quiet, and the Exarchate at peace with its neighbours. Clotaire the Frank was no enemy to Heraclius, and in common with his clergy (being orthodox and not Arian) might be expected to sympathise in so holy a cause.

Treachery of the Avars—A.D. 616.—In one quarter only was there room for fear. The Avars were on the Danube, and the turbulence of the Avars was only equalled by their perfidy. Already, in A.D. 610, they had fallen suddenly on North Italy, and pillaged and harassed those same Lombards whom they had before helped to destroy the Gepidæ. Previous to an absence, therefore, of years from his capital, it was essential for the Emperor to sound their intentions, and, if possible, to secure their neutrality. His ambassadors were welcomed with apparent cordiality, and an interview was arranged between the Chagan and Heraclius. The place was to be Heraclea. At the appointed time the Emperor set out from Selymbria to meet the Khan, decked with Imperial crown and mantle to honour the occasion. The escort was a handful of soldiers; but there was an immense cortége of high officials and of the fashionable world of Constantinople, and the whole country side was there to see. Presently some terrified peasants were seen making their way hurriedly towards Heraclius. They urged him to flee for his life; for armed Avars had been seen in small bodies, and might even now be between him and the capital. Heraclius knew too much to hesitate. He threw off his robes and fled, and but just in time. The Chagan had laid a deep plot. A large mass of men had been told off in small detachments

I say the pulpit (in the sober use
 Of its legitimate peculiar pow'rs)
 Must stand acknowledg'd, while the world shall stand,
 The most important and effectual guard,
 Support and ornament of virtue's cause.
 There stands the messenger of truth : there stands
 The legate of the skies ; his theme divine,
 His office sacred, his credentials clear.
 By him, the violated law speaks out 340
 Its thunders, and by him, in strains as sweet
 As angels use, the Gospel whispers peace.
 He stablishes the strong, restores the weak,
 Reclaims the wand'rer, binds the broken heart,
 And, arm'd himself in panoply complete
 Of heav'nly temper, furnishes with arms
 Bright as his own, and trains, by ev'ry rule
 Of holy discipline, to glorious war,
 The sacramental host of God's elect.
 Are all such teachers? would to heav'n all were ! 350
 But hark—the Doctor's voice—fast wedged between
 Two empirics he stands, and with swoln cheeks
 Inspires the news, his trumpet. Keener far
 Than all invective is his bold harangue,
 While through that public organ of report
 He hails the clergy ; and, defying shame,
 Announces to the world his own and theirs.
 He teaches those to read, whom schools dismiss'd,
 And colleges, untaught ; sells accent, tone,
 And emphasis in score, and gives to pray'r 360
 Th' *adagio* and *andante* it demands.
 He grinds divinity of other days
 Down into modern use ; transforms old print
 To zigzag manuscript, and cheats the eyes
 Of gall'ry critics by a thousand arts.—
 Are there who purchase of the Doctor's ware?
 Oh name it not in Gath !—it cannot be,
 That grave and learned Clerks should need such aid.
 He doubtless is in sport, and does but droll,
 Assuming thus a rank unknown before, 370
 Grand caterer and dry-nurse of the church.

I venerate the man whose heart is warm,
 Whose hands are pure, whose doctrine and whose life.

gether as with a close seal. . . . The flakes of his flesh are joined together: they are firm in themselves; they cannot be moved."

Hobbes, in his famous book to which he gave the title *Leviathan*, symbolised thereby the force of civil society, which he made the foundation of all right.

315-325 Cowper's limitation of the province of satire—that it is fitted to laugh at foibles, not to subdue vices—is on the whole well-founded. But we cannot forget Juvenal's famous "facit indignatio versum," or Pope's no less famous—

"Yes, I am proud: I must be proud to see
Men not afraid of God, afraid of me:
Safe from the bar, the pulpit, and the throne,
Yet touched and shamed by ridicule alone."

326-372 *The pulpit, not satire, is the proper corrector of sin. A description of the true preacher and his office, followed by one of the false preacher, "the reverend advertiser of engraved sermons."*

330 *Strutting and vapouring.* Cf. *Macbeth*, v. 5.

"Life's but a walking shadow, a poor player,
That struts and frets his hour upon the stage,
And then is heard no more; it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing."

"And what in real value's wanting,
Supply with vapouring and ranting."—HUDIBRAS.

331 *Proselyte.* *προσέλυτος*, a new comer, a convert to Judaism.

338 *His theme divine.* Nominative absolute.

343 *Stablishes.* Notice the complete revolution the word has made—*stabilire*, *établir*, *establish*, *stablish*; cf. *state*, &c.

346 *Of heavenly temper.* Cf. *Par. Lost*, i. 284, "his ponderous shield ethereal temper." See note on *Winter Morning Walk*, l. 664.

349 *Sacramental.* Used in the Latin sense. *Sacramentum* was the oath of allegiance of a Roman soldier. The word in its Christian sense was first applied to baptism—the vow to serve faithfully under the banner of the cross. See *Browne on the Thirty-nine Articles*, p. 576.

350 *Would to heaven.* A confusion between "would God" and "I pray to heaven."

351 A picture from the life of a certain Dr Trusler, who seems to have combined the trades of preacher, teacher of elocution, writer of sermons, and literary hack.

352 *Empirics.* *ἐμπειρικός*, one who trusts solely to experience or practice instead of rule, hence a quack. The accent is the same as in Milton (an exception to the rule. See note on *Sofa*, l. 52).

thus: if the articles had cost £1 each, the total cost would have been £2478;

∴ as they cost $\frac{1}{2}$ of £1 each, the cost will be £ $\frac{2478}{2}$, or £413.

The process may be written thus:

3s. 4d. is $\frac{1}{2}$ of £1 | £2478 = cost of the articles at £1 each.

£413 = cost at 3s. 4d. ...

Ex. (2). Find the cost of 2897 articles at £2. 12s. 9d. each.

£2 is 2 × £1		2897 . 0 . 0 = cost at £1 each.
10s. is $\frac{1}{2}$ of £1		5794 . 0 . 0 = £2
2s. is $\frac{1}{5}$ of 10s.		1448 . 10 . 0 = 10s.
8d. is $\frac{1}{3}$ of 2s.		289 . 14 . 0 = 2s.
1d. is $\frac{1}{8}$ of 8d.		96 . 11 . 4 = 8d.
		12 . 1 . 5 = 1d.
		£7640 . 16 . 9 = £2. 12s. 9d. each.

NOTE.—A shorter method would be to take the parts thus:

10s. = $\frac{1}{2}$ of £1; 2s. 6d. = $\frac{1}{4}$ of 10s.; 3d. = $\frac{1}{10}$ of 2s. 6d.

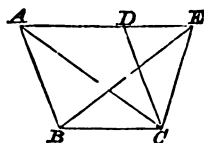
Ex. (3). Find the cost of 425 articles at £2. 18s. 4d. each.

Since £2. 18s. 4d. is the difference between £3 and 1s. 8d. (which is $\frac{1}{12}$ of £1), the shortest course is to find the cost at £3 each, and to *subtract from it* the cost at 1s. 8d. each, thus:

£3 is 3 × £1		£	s.	d.	
		425 .	0 .	0 = cost at £1 each.	
1s. 8d. is $\frac{1}{12}$ of £1		1275 .	0 .	0 = £3	
		35 .	8 .	4 = 1s. 8d. each.	
		£1239 .	11 .	8 = £2. 18s. 4d. each.	

PROPOSITION XLI. THEOREM.

If a parallelogram and a triangle be upon the same base, and between the same parallels, the parallelogram is double of the triangle.



Let the $\square ABCD$ and the $\triangle EBC$ be on the same base BC and between the same \parallel s AE, BC .

Then must $\square ABCD$ be double of $\triangle EBC$.

Join AC .

Then $\triangle ABC = \triangle EBC$, \therefore they are on the same base and between the same \parallel s ; I. 37.

and $\square ABCD$ is double of $\triangle ABC$, $\therefore AC$ is a diagonal of $ABCD$; I. 34.

$\therefore \square ABCD$ is double of $\triangle EBC$.

Q. E. D.

Ex. 1. If from a point, without a parallelogram, there be drawn two straight lines to the extremities of the two opposite sides, between which, when produced, the point does not lie, the difference of the triangles thus formed is equal to half the parallelogram.

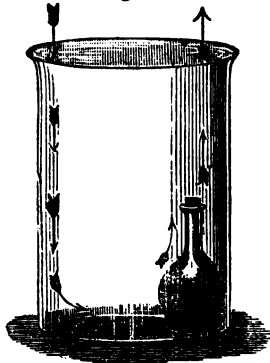
Ex. 2. The two triangles, formed by drawing straight lines from any point within a parallelogram to the extremities of its opposite sides, are together half of the parallelogram.

Sometimes carbonic anhydride is produced in wells, and, being so much heavier than air, it remains at the bottom. If a man goes down into such a well, he will have no difficulty at first, because the air is good; but when he is near the bottom, where the gas has accumulated, he will gasp for breath and fall; and if anyone, not understanding the cause of his trouble, goes down to assist him, he too will fall senseless, and both will quickly die. The way to ascertain whether carbonic anhydride has accumulated at the bottom of a well is to let a light down into it. If it goes out, or even burns very dimly, there is enough of the gas to make the descent perilous. A man going down a well should always take a candle with him, which he should hold a considerable distance below his mouth. If the light burns dimly, he should at once stop, before his mouth gets any lower and he takes some of the gas into his lungs.

When this gas is in a well or pit, of course it must be expelled before a man can descend. There are several expedients for doing this. One is to let a bucket down frequently, turning it upside down, away from the mouth of the well, every time it is brought up, a plan which will remind you of the experiment represented in Fig. 24.

But a better way is to let down a bundle of burning straw or shavings, so as to heat the gas. Now heated bodies expand, gases very much more than solids or liquids, and, in expanding, the weight of a certain volume, say of a gallon, becomes lessened. So that if we can heat the carbonic anhydride enough to make a gallon of it weigh less than a gallon of air, it will rise out of the well just as hydrogen gas would do. Fig. 25 shows how you may perform this experiment upon a small scale.

Fig. 25.



DISASTROUS RETREAT OF THE ENGLISH FROM CABUL.

IT took two days of disorder, suffering, and death to carry the army, now an army no more, to the jaws of the fatal pass. Akbar Khan, who appeared like the Greeks' dread marshal from the spirit-land at intervals upon the route, here demanded four fresh hostages. The demand was acquiesced in. Madly along the narrow defile crowded the undistinguishable host, whose diminished numbers were still too numerous for speed : on every side rang the war-cry of the barbarians : on every side plundered and butchered the mountaineers : on every side, palsied with fatigue, terror, and cold, the soldiers dropped down to rise no more. The next day, in spite of all remonstrance, the general halted his army, expecting in vain provisions from Akbar Khan. That day the ladies, the children, and the married officers were given up. The march was resumed. By the following night not more than one-fourth of the original number survived. Even the haste which might once have saved now added nothing to the chances of life. In the middle of the pass a barrier was prepared. There twelve officers died sword in hand. A handful of the bravest or the strongest only reached the further side alive : as men hurry for life, they hurried on their way, but were surrounded and cut to pieces, all save a few that had yet escaped. Six officers better mounted or more fortunate than the rest, reached a spot within sixteen miles of the goal ; but into the town itself rode painfully on a jaded steed, with the stump of a broken sword in his hand, but one.

LIVY, xxi. c. 25, § 7-10. xxxv. c. 30. xxiii. c. 24.

CÆSAR, *Bell. Gall.* v. c. 35-37.

DEFEAT OF CHARLES THE BOLD AND MASSACRE OF HIS TROOPS AT MORAT.

IN such a predicament braver soldiers might well have ceased to struggle. The poor wretches, Italians and Savoyards thousand or more in number, threw away their arms and

ISARGENT AND D... MODELS—See P.

II.

ARIADNE'S LAMENT.

Madam, 'twas Ariadne passioning
For Theseus' perjury and unjust flight.

TWO GENTLEMEN OF VERONA, IV. 4, 172.

ARGUMENT.

ARIADNE tells the story of her first waking, to find herself abandoned by Theseus and left on an unknown island, exposed to a host of dangers.—(HEROIDES, x.)

The story is beautifully told by Catullus, in the "*Epithalamium Pelci et Thetidos*:" it also forms one of the episodes in Chaucer's "*Legende of Goode Women*."

I woke before it was day to find myself alone, no trace of my companions to be seen. In vain I felt and called for Theseus; the echoes alone gave me answer.

	QUAE legis, ex illo, Theseu, tibi litore mitto,	
	Unde tuam sine me vela tulere ratem :	
	In quo me somnusque meus male prodidit et tu,	
	Per facinus somnis insidiate meis.	107
	Tempus erat, vitrea quo primum terra pruina	112
	Spargitur et tectae fronde queruntur aves :	
	Incertum vigilans, a somno languida, movi	97
	Thesea prensuras semisupina manus :	
	Nullus erat, referoque manus, iterumque retempto,	
10	Perque torum moveo brachia : nullus erat.	
	Excussere metus somnum : conterrita surgo,	
	Membraque sunt viduo praecipitata toro.	123
	Protinus adductis sonuerunt pectora palmis,	111
	Utque erat e somno turbida, rapta coma est.	
	Luna fuit : spectro, siquid nisi litora cernam ;	
	Quod videant, oculi nil nisi litus habent.	150
	Nunc huc, nunc illuc, et utroque sine ordine curro ;	
	Alta puellares tardat arena pedes.	
	Interea toto clamanti litore "Theseu !"	121
20	Reddebant nomen concava saxa tuum,	
	Et quoties ego te, toties locus ipse vocabat :	
	Ipse locus miserae ferre volebat opem.	106 3

STORIES FROM OVID.

174. **Punica poma**, pomegranates.
 178. **Taenarum**, at the southern extremity of Peloponnesus, was one of the numerous descents to Tartarus. Cf. Virgil, Georg. IV. 467:
 Taenarias etiam fauces, alta ostia Ditis.
 179. **Factura fuit**. This periphrasis for *fecisset* is to be noted; it is the one from which the oblique forms are all constructed, e.g., *facturam fuisse*, or *factura fuisset*.
 183. **Cessatis**, one of a goodly number of intransitive verbs of the first conjugation which have a passive participle. Cf. *erratas*, above, 139, *clamata*, 35. So Horace, *regnata Phalanto rura* (Odes, II. 6, 12); *triumphatae gentes* (Virgil).

II.—IV.

ARIADNE.

THIS and the two following extracts, though taken from different works, form a definite sequence. Ariadne, daughter of Minos, king of Crete, has helped Theseus to conquer the Minotaur, by giving him a clew to the maze in which the monster was hid, and, being in love with him, has fled in his company. They put in for the night to the island of Dia, and Theseus on the next morning treacherously sails away, leaving the poor girl alone. The first extract is part of an epistle which she is supposed to write on the day when she discovers his perfidy.

The name Dia, which belonged properly to a small island off the north coast of Crete, was also a poetical name for Naxos, one of the largest of the Cyclades. It may have been this fact which led to the further legend which is recounted in the next extract, how Ariadne, lorn of Theseus, becomes the bride of Bacchus; for Naxos was the home of the Bacchic worship. As the completion of the legend she is raised to share in Bacchus' divine honours, and as the Cretan Crown becomes one of the signs of the heavens.

II.

ARIADNE'S LAMENT.

1. **Illo**, sc. *Diae*.
4. **Per facinus**, criminally.
5. Describing apparently the early dawn, or the hour that precedes it, when the night is at its coldest, and the birds, half-awake, begin to stir in their nests. *Fruina* hints that it is autumn.
7. A beautifully descriptive line—But half-awake, with all the languor of sleep still on me.
 A somno = after, as the *result* of.
8. **Semisupina**, on my side, lit., half on my back, describes the motion of a person thus groping about on waking. Cf. Chaucer:

Ryght in the dawaynyge awaketh shee,
 And gropeth in the bed, and fonde ryghte noghte.

55 haec mea magna fides? at non, Euandre, pudendis
 vulneribus pulsum aspicias, nec sospite dirum
 optabis nato funus pater. ei mihi, quantum
 praesidium Ausonia, et quantum tu perdis, Iule!

Haec ubi deflevit, tolli miserabile corpus

60 imperat, et toto lectos ex agmine mittit
 mille viros, qui supremum comitentur honorem,
 intersintque patris lacrimis, solacia luctus
 exigua ingentis, misero set debita patri.
 haut segnes alii crates et molle feretrum

65 arbuteis texunt virgis et vimine querno,
 extractosque toros obtentu frondis inumbrant.
 hic iuvenem agresti sublimem stramine ponunt;
 qualem virgineo demessum pollice florem
 seu mollis violae, seu languentis hyacinthi,

70 cui neque fulgor adhuc, nec dum sua forma recessit;
 non iam mater alit tellus, viresque ministrat.
 tunc geminas vestes auroque ostroque rigentis
 extulit Aeneas, quas illi laeta laborum
 ipsa suis quondam manibus Sidonia Dido

75 fecerat, et tenui telas discreverat auro.
 harum unam iuveni supremum maestus honorem
 induit, arsurasque comas obnubit amictu;
 multaue praeterea Laurentis praemia pugnae
 aggerat, et longo praedam iubet ordine duci.

80 addit equos et tela, quibus spoliaverat hostem.
 vinxerat et post terga manus, quos mitteret umbris
 inferias, caeso sparsuros sanguine flammam;
 indutosque iubet truncos hostilibus armis
 ipsos ferre duces, inimicaque nomina figi.

85 ducitur infelix aevo confectus Acoetes,
 pectora nunc foedans pugnis, nunc unguibus ora;
 sternitur et toto proiectus corpore terrae.

Comp. *Geor.* ii. 80, *Nec longum tempus et . . . exiit . . . arbos*, C. But as these are the only two instances of the construction adduced it is perhaps safer to take *et* = even.

51 *nū iam*, etc.] The father is making vows to heaven in his son's behalf, but the son is gone where vows are neither made nor paid.

55 *haec mea magna fides*] 'Is this the end of all my promises?' *Magna* may be taken as 'solemn,' or 'boastful.'

pudendis vulneribus] All his wounds are on his breast.

56 *dirum optabilis funus* = *morti devotebis*. Compare the meaning of *dirae*, xii. 845.

59-99] A description of the funeral rites. Aeneas bids his last farewell.

59 *Haec ubi deflevit*] 'His moan thus made.' *De* in composition has two opposite meanings: (1) cessation from or removal of the fundamental ideas, as in *decreseo*, *dedoceo*, etc.; (2) (as here) in intensifying, as *debello*, *demiror*, *desaevio*.

61 *honorem*] *Honos* is used by V. for (1) a sacrifice, iii. 118; (2) a hymn, *Geor.* ii. 393; (3) beauty, *Aen.* x. 24; (4) the 'leafy honours' of trees, *Geor.* ii. 404; (5) funeral rites, vi. 333, and here. See below, l. 76.

63 *solatia*] In apposition to the whole sentence; whether it is nom. or acc. depends on how we resolve the principal sentence; here, though *solatia* applies to the whole sentence, its construction probably depends on the last clause, which we may paraphrase, *ut praesentes* (τὸ μετεῖναι) *sunt solatia*; therefore it is nom.

64 *crates et molle feretrum*] The bier of pliant osier: cf. l. 22.

66] Cf. Statius, *Theb.* vi. 55, *torus et puerile feretrum*.

obtentu frondis] 'A leafy canopy.' C. understands 'a layer of leaves.'

67 *agresti stramine*] 'The rude litter.'

68] Cf. ix. 435; *Il.* viii. 306,

μήκων δ' ὡς ἐτέρωσε κάρη βάλεν, ἦτ' ἐνὶ κήπῳ
καρπὸν βριθομένη νοτίησιν τε εἰαρινήσιν
ὡς ἐτέρωσ' ἤμυσσε κάρη πύληκι βαρυνθέν.

'Even as a flower,
Poppy or hyacinth, on its broken stem
Languidly raises its encumbered head.'—MILMAN.

69 *languentis hyacinthi*] The rhythm is Greek. The 'drooping hyacinth' is probably the *Lilium Martagon* or Turk's-cap lily, 'the sanguine flower inscribed with woe.'

70] 'That hath not yet lost its gloss nor all its native loveliness.' *Recessit* must apply to both clauses. 'If we suppose the two parts of the line to contain a contrast, the following line will lose much of its force,' C. Compare the well-known lines from the *Giaour*, 'He who hath bent him o'er the dead,' etc.

71] Contrast the force of *neque adhuc*, *nec dum*, and *non iam*; 'the brightness not all gone,' 'the lines where beauty lingers,' and 'the support and nurture of mother earth cut off once and for all.'

36. *ἵνα φάγῃ*] In modern Greek, which properly speaking has no infinitive, the sense of the infinitive is expressed by *νά* (*ἵνα*) with subjunctive (as in this passage), e.g. *ἐπιθυμῶ νά γράφῃ*, 'I wish him to write;' see Corfe's *Modern Greek Grammar*, p. 78. This extension of the force of *ἵνα* to oblique petition, and even to consecutive clauses, may be partly due to the influence of the Latin *ut*; cf. ch. xvi. 27, *ἐρωτῶ οὖν, πάτερ, ἵνα πέμψῃς*: see note on ch. iv. 3.

The following incident is recorded by St. Luke alone. Simon the Pharisee is not to be identified with Simon the leper, Matt. xxvi., Mark xiv. 3.

ἀνεκλίθη] The Jews had adopted the Roman, or rather Greek, fashion of reclining at meals—a sign of advancing luxury and of Hellenism, in which however even the Pharisee acquiesces.

37. *γυνή*] There is no proof that this woman was Mary Magdalene. But mediæval art has identified the two, and great pictures have almost disarmed argument in this as in other incidents of the gospel narrative.

38. *ἀλάβαστρον*] The neuter sing. is Hellenistic. The classical form is *ἀλάβαστρος* with a heteroclite plural *ἀλάβαστρα*, hence probably the late sing. *ἀλάβαστρον*. The grammarian stage of a language loves uniformity, Herod. iii. 20; Theocr. xv. 114:

Συρίω δὲ μύρω χρύσει' ἀλάβαστρα.

στᾶσα παρὰ τοὺς πόδας αὐτοῦ] This would be possible from the arrangement of the triclinium.

39. *ἐγίνωσκεν ἂν*] 'Would (all the while) have been recognising.'

40. *χρεωφειλέται*] A late word; the form varies between *χρεωφειλέται* and *χρεοφειλέται*.

41. *δηνάρια*] The denarius was a silver coin originally containing ten ases (deni), afterwards, when the weight of the as was reduced, sixteen ases. Its equivalent modern value is reckoned at 7½d. But such calculations are misleading; it is more to the point to regard the denarius as an average day's pay for a labourer.

42. *μὴ ἐχόντων*] Because he saw that they had not.
ἐναρίσαστο] Cf. v. 21.

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